117.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 617

W. YALE SMILEY, PETITIONER,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JANUARY 5, 1932

CERTIORARI GRANTED FEBRUARY 15, 1932

(36,431)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No.

W. YALE SMILEY, PETITIONER,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

INDEX

	Original	Print
Record from district court of Ramsey County	1	1
Petition	1	1
Demurrer to petition	14	13
Order sustaining demurrer	14	13
Notice of appeal from order	15	14
Judgment of dismissal	16	14
Notice of appeal from judgment	16	15
Proceedings in supreme court of Minnesota	17	15
Opinion per curiam sustaining judgment	17	15
Judgment	18	16
Exhibits:		
"A"—Map of Minnesota	19	17
"B"—Map of Minneapolis	20	19
"C"—Memorandum of trial court on demurrer	21	20
"D"—Opinion of supreme court of appeal from the order sustaining the demurrer	38	44
Dissenting opinions	53	58
Clerk's certificate (omitted in printing)	60	
Order allowing certiorari		65

[fols. a & 1]

IN SUPREME COURT OF MINNESOTA

1931

THE STATE OF MINNESOTA Upon the Relation of W. YALE SMILEY, Appellant,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, Respondent

IN DISTRICT COURT OF RAMSEY COUNTY

PETITION

To the Honorable the Judges of the District Court of Ramsey County, Minnesota, Second Judicial District:

I

The petition of W. Yale Smiley respectfully shows to the Court that he is a citizen, elector and taxpayer of the State of Minnesota, residing in the City of Minneapolis, Hennepin County, Minnesota, in the Fourth Ward of said City.

II

That he requested Hon. Henry N. Benson, Attorney General of the State of Minnesota, to make this Petition and that said Henry N. Benson, Attorney General of Minnesota, refused so to do on April 29th, 1931, for the reason that it is his duty to appear as attorney for all state officers when sued in their official capacity.

III

That Mike Holm is the duly elected, qualified and acting Secretary of the State of Minnesota, and that his official acts are done and performed at the State Capitol, in the City of St. Paul, Ramsey County, Minnesota.

[fol. 2] IV

That the Congress of the United States by act of August 8, 1911, duly determined that there shall be elected ten members of Congress from ten districts in the State of Minnesota, and that said districts shall be "composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants," said act hereinbefore referred to is hereby made a part hereof with the same force and effect as is hereat set out in full.

V

That pursuant to Section 22, Subdivision (a), of an Act of Congress approved June 18, 1929, entitled "An Act to provide for the fifteenth and subsequent decennial censuses, and to provide for apportionment of representatives in Congress," the President of the United States on December 4, 1930, transmitted the following message to Congress:

"To the Congress of the United States:

"In compliance with the provisions of Section 22 (a) of the Act approved June 18, 1929, I transmit herewith a statement prepared by the Bureau of the Census, Department of Commerce, giving the whole number of persons in each state, exclusive of Indians not taxed, as ascertained under the Fifteenth Decennial Census of population, and the number of Representatives to which each state would be entitled under an apportionment of the existing number of Representatives by the method known as the method of major fractions, which was the method used in the last preceding apportionment, and also by the method known as the method of equal proportions.

Herbert Hoover.

The White House,
December 4, 1930."

Alleges that the statement accompanying the President's message, insofar as it relates to the State of Minnesota, is as follows:

[fol. 3] Population as enumerated April 1, 1930 . . 2,563,953
Indians not taxed 12,370

Population basis of apportionment	2,551,583
Apportionment of 435 Representatives by a method of Major fractions used in last preceding apportionment	9
Equal proportions	9

Reference is hereby made to said Act of Congress of June 18, 1929, last mentioned and said message of the President of the United States thereunder with the same force and effect as if said Act and said message were hereat set out in full.

VI

That pursuant to said Act of Congress, last mentioned, Wm. Tyler Page, Clerk of the House of Representatives of the United States, on or about March 6th, 1931, transmitted to the Governor of the State of Minnesota, the following certificate:

"House of Representatives, Clerk's Office, Washington, D. C.

"I, Wm. Tyler Page, Clerk of the House of Representatives of the United States, hereby certify, pursuant to Section 22, subdivision (b) of the Act of Congress of the United States of America entitled 'An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to provide for apportionment of Representatives in Congress,' approved June 18, 1929, that the State of Minnesota shall be entitled, in the Seventy-third Congress and in each Congress thereafter until the taking effect of a reapportionment under said act or subsequent statute, to Nine (9), representatives of the Congress of the United States.

"In Witness whereof I hereto affix my name and the seal of the House of Representatives of the United States of America this Fourth Day of March, Anno Domini 1931, in the City of Washington, District of Columbia."

Wm. Tyler Page, Clerk of the House of Representatives of the United States. (Official Seal of the House of Representatives.)

[fol. 4]

VII

That the Congress of the United States is not now in session and has not been called in Special Session.

That on the second day of April, 1931, there was duly introduced in the House of Representatives of the Legislature of the State of Minnesota in the Forty-seventh Session thereof, a bill for an act entitled an act, "To divide the State of Minnesota into nine Congressional Districts" which, as amended, read as follows, and which thereupon became and is now known as House File 1456 to-wit:

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The State of Minnesota is hereby divided into nine Congressional districts, each of which is entitled to elect one representative to the Congress of the United States.

Section 2. The Counties of Houston, Fillmore, Winona, Wabasha, Olmsted, Mower, Dodge, Freeborn, Waseca, and Steele shall constitute the First Congressional District.

Section 3. The Counties of Blue Earth, Faribault, Martin, Watonwan, Brown, Cottonwood, Jackson, Nobles, Rock, Pipestone, Murray, Redwood, Lyon and Lincoln shall constitute the Second Congressional District.

Section 4. The Counties of Washington, McLeod, Sibley, Nicollet, LeSueur, Carver, Scott, Rice, Dakota, Goodhue, and the Fourth Ward of the City of Minneapolis and the villages of Deephaven, Edina, Excelsior, Long Lake, Minnetonka Beach, St. Bonifacius, Island Park, Richfield, St. Louis Park, Tonka Bay, Wayzata, Hopkins, Maple Plain, Morningside, Mound, and the towns of Bloomington, Eden Prairie, Excelsior, Independence, Minnetonka, Minnetrista and Orono in Hennepin County shall constitute the Third Congressional District.

Section 5. The County of Ramsey shall constitute the Fourth Congressional District.

[fol. 5] Section 6. The Town of St. Anthony in Hennepin County and the City of Minneapolis except the Third, Fourth and Tenth wards thereof shall constitute the Fifth Congressional District.

Section 7. The Counties of Anoka, Benton, Sherburn, Stearns, Morrison, Mille Lacs, Isanti, Chisago, Kanabec, Pine, Aitkin, Crow Wing, Cass, Todd, Hubbard and Wadena shall constitute the Sixth Congressional District.

Section 8. The Counties of Grant, Douglas, Traverse, Stevens, Pope, Big Stone, Swift, Lac qui Parle, Chippewa, Yellow Medicine, Renville, Kandiyohi, Meeker, Wright and the Villages of Dayton, Golden Valley, Hanover, Osseo, Rogers, Crystal, Robbinsdale, Brooklyn Center, that part of the Village of Rockford in Hennepin County, and the towns of Brooklyn, Champlin, Corcoran, Dayton, Greenwood, Hassan, Maple Grove, Medina and Plymouth in the County of Hennepin and the Third and Tenth wards of the City of Minneapolis, shall constitute the Seventh Congressional District.

Section 9. The Counties of Koochiching, Itasca, Carlton, St. Louis, Lake and Cook shall constitute the Eighth Congressional District.

Section 10. The Counties of Otter Tail, Wilkin, Clay, Becker, Mahnomen, Norman, Polk, Marshall, Red Lake, Pennington, Kittson, Roseau, Clearwater, Beltrami, and Lake of the Woods, shall constitute the Ninth Congressional District.

Section 11. All acts and parts of acts inconsistent herewith are hereby repealed.

Section 12. This act shall take effect and be in force from and after its passage.

That on April 27, 1931, said Bill for an Act was deposited for filing in the office of the Secretary of State of the State of Minnesota. That a map or maps showing the geographical divisions according to said House File 1456 is filed herewith and hereby referred to and made a part hereof.

[fol. 6] IX

That on the 15th day of April, 1931, the House of Representatives of the State of Minnesota was in session duly assembled and a quorum being present and acting said Bill for an Act last mentioned was duly, then and there, put to a vote, therein, and thereupon a majority of the Representatives voted in favor of said Bill and said Bill was duly passed by said House and then and there so declared.

That on the 20th day of April, 1931, the Senate of the State of Minnesota was in session duly assembled, and thereupon duly received from said House of Representa-

tives said Bill for an Act hereinbefore set forth; and thereupon said Bill for an Act was then and there duly put to a vote therein; and thereupon a majority of the Senate voted in favor of said Bill and said Bill was duly passed by said Senate and then and there so declared.

X

That thereupon said House File 1456 was transmitted to the Governor of the State of Minnesota for the action of said Governor thereon in accordance with law. That on the 20th day of April, 1931, said Governor of said State of Minnesota returned said House File 1456 to the House of Representatives of the Legislature of said State with a veto of the tenor following:

Executive and Official Communications, State of Minnesota, Executive Department

St. Paul, April 20, 1931.

Hon. Oscar A. Swenson, Speaker of the House of Representatives:

Sir: I am returning herewith without my approval H. F. No. 1456, "A bill for an act to divide the State of Minnesota into nine Congressional Districts."

The State of Minnesota must be redistricted but that redistricting should be based upon a fair division of population. H. F. No. 1456 is obviously an inequitable distri- [fol. 7] bution of the population of Minnesota.

There is a difference of 116,000 between the proposed Fifth District, which contains the largest population, and the proposed First District, which contains the smallest population.

Taking the so-called agricultural districts there is a difference of 98,000 between the proposed Seventh District, an agricultural district which contains the largest population of the agricultural districts, and the proposed First District, an agricultural district which contains the smallest population. This is an unfair discrimination between agricultural districts.

Minnesota being an agricultural state is entitled to as much representation in Congress as possible. A plan of reapportionment may easily be worked out which does not

involve any great disparity between agricultural districts as such nor any great disparity between so-called country and so-called city districts; and which will be fair from the standpoint of contiguous territory.

The people of Minnesota are entitled to a reapportionment upon the basis of an equitable distribution of the population, and upon the basis of contiguous territory.

To avoid the confusion of having candidates for Congress from Minnesota running at large I earnestly urge you to work out an equitable plan of reapportionment.

Respectfully, Floyd B. Olson, Governor.

XI

That thereupon said House of Representatives and said Senate took no further action on said bill except as hereafter set forth.

XII

That on the 22nd day of April, 1931, said House of Representatives adopted the following resolution:

Whereas, on the 16th day of April, 1931, the House of Representatives of the State of Minnesota duly passed H. F. No. 1456, a bill for an act to divide the State of Minnesota into nine Congressional Districts; and

[fol. 8] Whereas, on the 20th day of April, 1931, said H. F. No. 1456 was duly passed by the Senate of the State of Minnesota; and

Whereas, said bill is now in the possession of the House,

Now, therefore, be it resolved, That the Chief Clerk of the House be and he is hereby directed to deposit for filing with the Secretary of State the enrolled copy of said H. F. No. 1456, said bill to become and remain part of the permanent records of the office of the Secretary of State.

That *H*ournals of the House of Representatives and the Senate of the Legislature of the State of Minnesota at the Forty-seventh Session thereof contain a full and complete report of the matters hereinbefore stated and are respectively referred to for greater particularity.

XIII

That thereupon the said House File 1456 on the 27th day of April, 1931, without further action by the Senate and/or the House of Representatives of the Legislature

for the State of Minnesota and/or without being presented to the Governor of said State, was deposited for filing in the office of the Secretary of State of the State of Minnesota in accordance with the terms of said resolution.

XIV

That the Legislature of the State of Minnesota adjourned sine die on the 22nd day of April, 1931, is not now in session, and has not been called in Special Session.

XV

That the population of the various congressional districts provided for in said Bill for an Act, said House File 1456, as shown by the Census of the United States for the year 1930, was as follows:

[fol. 9] First congressional district	228,596
Second congressional district	251,734
Third congressional district	291,601
Fourth congressional district	286,721
Fifth congressional district	344,500
Sixth congressional district	301,984
Seventh congressional district	326,391
Eighth congressional district	276,633
Ninth congressional district	253,786

XVI

That as hereinbefore stated, the population of the State of Minnesota on the 1st day of April, 1930, exclusive of Indians not taxed, equalled 2,551,583, and that on the basis thereof, an equal division of the population of the State of Minnesota as above set forth into nine congressional districts would allocate 283,509 inhabitants in each congressional district.

XVII

That at the time of the happenings of the matters hereinbefore set forth, Section 12 of Article 4 of the Constitution of the State of Minnesota provided as follows:

No money shall be appropriated except by bill. Every order, resolution or vote requiring the concurrence of the two houses except such as relate to the business or adjourn-

ment of the same shall be presented to the Governor for his signature and before the same shall take effect shall be approved by him or being returned by him with his objections shall be passed by two-thirds of the members of the two houses according to the rules and regulations prescribed in case of a bill.

That said resolution of the House of Representatives, hereinbefore mentioned, was not presented to said Senate for action in relation thereon or to the Governor of said State for action in relation thereto.

[fol. 10] XVIII

That at all times mentioned, it has been, and now is, one of the duties of said Secretary of State to receive filings of candidates for nomination to the office of representative in Congress from all persons eligible to be candidates thereat; and to refuse such filings for nomination thereto when said persons tendering the same appear to be ineligible. That in connection with said filings at all of said times, it likewise was, and now is, another duty of said Secretary of State to supervise the printing of all necessary ballots for all such congressional elections, primary and otherwise, held therein.

That the expense thereof is great; that the filing fees of said candidates have never been sufficient to cover such expenses; and that the balance of such expense has been paid necessarily from the public treasury.

That under the law of the State of Minnesota at all of said times, it has been, and now is, also the duty of the Secretary of State to give notice of said congressional elections therein including an election for nomination to the office of representative in Congress.

XIX

That as your petitioner is informed and believes divers persons have filed and are now threatening to file with the said Secretary of State for nomination to the office of Representative in Congress from said State of Minnesota; and in connection therewith are designating and threatening to designate a subdivision of the State of Minnesota as a congressional district; that divers other persons have at-

tempted to file with said Secretary of State and are threatening to file for nomination *of* the office of representative in Congress from said State and are failing to designate any one subdivision of said State as a congressional district, and are claiming the right to file for such nomination for the office of representative in Congress at large from the entire State.

[fol. 11]

XX

That great uncertainty exists as to what law is applicable to the matters hereinbefore set forth; and that as your petitioner is informed and believes by reason thereof said Secretary of State of the State of Minnesota, notwithstanding all the matters hereinbefore stated, has accepted and has received the filing of one person as a candidate for nomination to the office of representative in Congress designating a subdivision of said State as a congressional district; and that said Secretary of State has refused to receive the filing of another person as a candidate for the nomination to the office of representative in Congress from the State of Minnesota, designating the entire State of Minnesota as a district; and that by reason thereof, divers suits have been and are about to be commenced in divers courts of the State of Minnesota in relation thereto; and there is bound to arise in said State and in the courts thereof great confusion and a multiplicity of actions, all having for their purpose the determination of what constitutes the law applicable.

That said Secretary of State wrongfully accepted said filing of said person as a candidate for the nomination to the office of representative in Congress designating a subdivision of said State of Minnesota as a congressional district, and as your petitioner is informed and believes unless restrained by the order of this Court will continue to receive similar filings similarly framed all in violation of the Statute in such case made and provided, and all to the great and irreparable injury of all the electors and taxpayers of the State of Minnesota including your petitioner.

XXI

That your petitioner, as a citizen of the United States and as a citizen, elector and taxpayer of the State of Minnesota,

claims herewith a privilege and right in his own behalf and on behalf of all other citizens, electors and taxpayers of [fol. 12] the State of Minnesota, under and by virtue of the acts of Congress hereinbefore referred to in that your petitioner claims the privilege and right, thereunder, to be represented in the Congress of the United States by nine representatives in Congress, duly elected by the electors of said State, from nine separate congressional districts therein, duly established by the legislature of the State of Minnesota, in accordance with and as provided by law; and further claims the right and privilege under said acts of Congress last mentioned to have each said nine congressional districts contain as near as practicable an equal number of inhabitants, and that said congressional districts shall be composed of a contiguous and compact territory.

XXII

That your petitioner is informed and believes said House File 1456 is invalid, is not an Act of the Legislature of the State of Minnesota, and is of no force or effect and null and void for the reason among others that said House File 1456 was duly and legally vetoed by the Governor of the State of Minnesota as hereinbefore set forth and never repassed by said Legislature as required by law.

XXIII

That the validity or invalidity of said House File 1456, directly affects each citizen, elector and taxpayer of the State of Minnesota.

XXIV

That a final determination of this action will settle and determine the questions herein presented and all questions which can be presented with reference to the receiving or rejecting of filings for nomination to the office of Representative in Congress from the State of Minnesota, and the giving of proper notices of election thereunder by said Secretary of State of the State of Minnesota.

[fol. 13] XXV

That your petitioner, as a citizen and elector, claims the privilege on his own behalf and on behalf of all other citi-

zens and electors of the State of Minnesota to be represented in the Congress of the United States by a Representative in Congress duly and legally nominated and elected to such office under and by virtue of the Constitution of the United States; the Acts of Congress applicable thereto; the Constitution of the State of Minnesota; and the laws of the State of Minnesota duly and legally enacted in respect thereto.

XXVI

That said House File 1456 is invalid and void in that it violates the direction of the Congress of the United States in two respects: (1) that said proposed congressional districts as named in said House File 1456 are not compact; (2) that said proposed congressional districts provided for in said House File 1456 do not contain an equal number of inhabitants as nearly as practicable.

XXVII

That your petitioner and all citizens, electors and taxpayers of the State of Minnesota are parties interested in this matter and have no speedy, sufficient or adequate remedy at law or in the due course of law; and that in the interest of all said citizens, electors and taxpayers, a speedy hearing and determination of the matters herewith presented is necessary to the welfare of the public; that an exigency exists in regard hereto in that the determination of this proceeding may necessitate the calling of the Legislature of said State in Special Session.

Wherefore, your petitioner prays that this Court declare invalid any and all filings for the nomination to [fol. 14] the office of Representative in Congress in the State of Minnesota designating a subdivision of the said State as a congressional district; enjoin said Secretary of State from receiving any filings for the office of Representative in Congress in the State of Minnesota which designate a subdivision of said State as a congressional district; and enjoin said Secretary of State from giving any notice of the holding of elections for the office of Representative in Congress in the State of Minnesota designating a subdivision of said State as a congressional district,

and for such other, further and different relief as to the court may seem just and proper.

(Signatures of Counsel.)

(Verification.)

IN DISTRICT COURT OF RAMSEY COUNTY

DEMURRER TO PETITION

The respondent demurs to the petition and alternative writ herein, upon the ground that the facts stated therein do not constitute a cause of action against the respondent.

Dated at St. Paul, Minnesota, this 12th day of May, 1931.

(Signatures of Counsel.)

IN DISTRICT COURT OF RAMSEY COUNTY

ORDER SUSTAINING DEMURRER

This matter came on for hearing before this Court at a Special Term held on the 16th day of May, 1931, in the Court House, in Ramsey County, Minnesota, on the demurrer of the respondent to the petition of the petitioner and relator.

The petitioner appeared in person and by George T. Simpson and John A. Weeks, his attorneys; and respondent appeared by Henry N. Benson, Attorney General of the State of Minnesota, and W. H. Gurnee, Assistant Attorney General.

[fol. 15] After hearing the arguments and upon all the files, records and proceedings herein, it is

Ordered, that said demurrer be sustained.

Dated June 12, 1931.

Gustavus Loeginger, Judge of the District Court.

(Stay of 30 days.)

(The Memorandum of the Trial Court attached to the preceding Order is set out in Appendix "C" herein.)

IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL FROM ORDER

To Henry N. Benson, Attorney General, for the above-named respondent, and to N. C. Robinson, Clerk of said District Court:

Please take notice that the above named W. Yale Smiley, appellant, appeals to the Supreme Court of the State of Minnesota, from the order of said District Court entered herein on the 11th day of June, A. D. 1931, sustaining the demurrer of Mike Holm, the respondent to the petition of the appellant and from each and every part and from the whole thereof.

Dated this 15th day of June, 1931.

(Stipulation waiving bond filed.)

(Signatures of Counsel.)

(Title)

OPINION SUSTAINING ORDER OF TRIAL COURT

The opinion and order of the Supreme Court appears in Volume 238 N. W. 494, — Minn. —, and is quoted verbatim in Appendix "B", hereto attached.

[fol. 16] IN DISTRICT COURT OF RAMSEY COUNTY

JUDGMENT OF DISMISSAL—Filed Oct. 19, 1931

The above entitled action being regularly upon the special term calendar for argument upon the demurrer of the respondent to the complaint of the petitioner and relator, came duly on for hearing before the court, Hon. Gustavus Loevinger, judge thereof, on the 16th day of May, 1931.

George T. Simpson, Esq., and John A. Weeks, Esq., appeared for the petitioner and relator, and Henry N. Benson, attorney general, and W. H. Gurnee, assistant attorney general, appeared for the respondent,

The matter having been argued and submitted to the court, and the court having on June 12, 1931, made an order sustaining the demurrer of the respondent to the complaint and petition of the petitioner and relator, and the petitioner and relator having failed to amend his complaint;

Now therefore, pursuant to said order, and on motion of the attorney general,

It is ordered, adjudged and decreed that said action be dismissed upon the merits, and that the respondent have judgment against the petitioner and relator for the sum of $12.00, costs and disbursements as taxed and allowed herein.

N. C. Robinson, Clerk of the District Court, by John A. Hanggi, Deputy.

[File endorsement omitted.]

IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL FROM JUDGMENT

To Henry N. Benson, Attorney General and attorney for the above-named Mike Holm, as Secretary of State, and to N. C. Robinson, Esq., Clerk of said District Court:

[fol. 17] Please take notice that the above named Petitioner and Relator hereby appeals to the Supreme Court of the State of Minnesota, from that certain judgment of the said District Court entered herein, on the 19th day of October, A. D. 1931, and from each and every part, and from the whole thereof.

Dated this 22nd day of October, A. D. 1931.

(Signature of Counsel.)

(Proof of service.)

IN SUPREME COURT OF MINNESOTA

OPINION SUSTAINING JUDGMENT

PER CURIAM:

The appeal is from a judgment. The case was here before and our opinion filed October 9, 1931. The questions involved in this appeal are the same as those involved in

the former appeal. They seem to be identical. For reasons given in the previous opinion and upon authority of that opinion the judgment from which this appeal was taken is affirmed.

[fol. 18] IN SUPREME COURT OF MINNESOTA

28825

THE STATE OF MINNESOTA Upon the Relation of W. YALE SMILEY, Relator,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, Respondent

JUDGMENT—Filed Nov. 17, 1931

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey, be and the same hereby is in all things affirmed, and that this judgment is final judgment in this cause in this court.

Dated and signed Nov. 17th, 1931.

By the Court. Attest: Grace Kaercher Davis, Grace Kaercher Davis, Clerk.

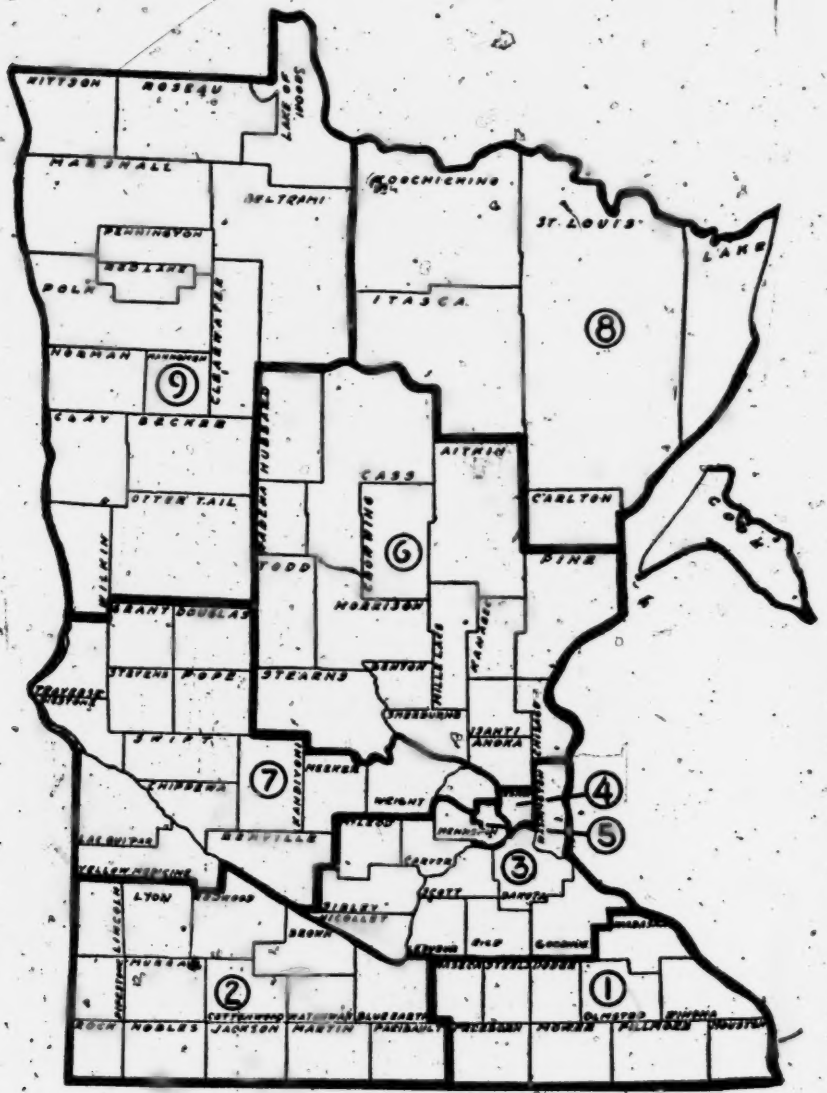
[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 19] EXHIBIT "A"

STATE OF MINNESOTA:

Showing Congressional Districts under House File 1456

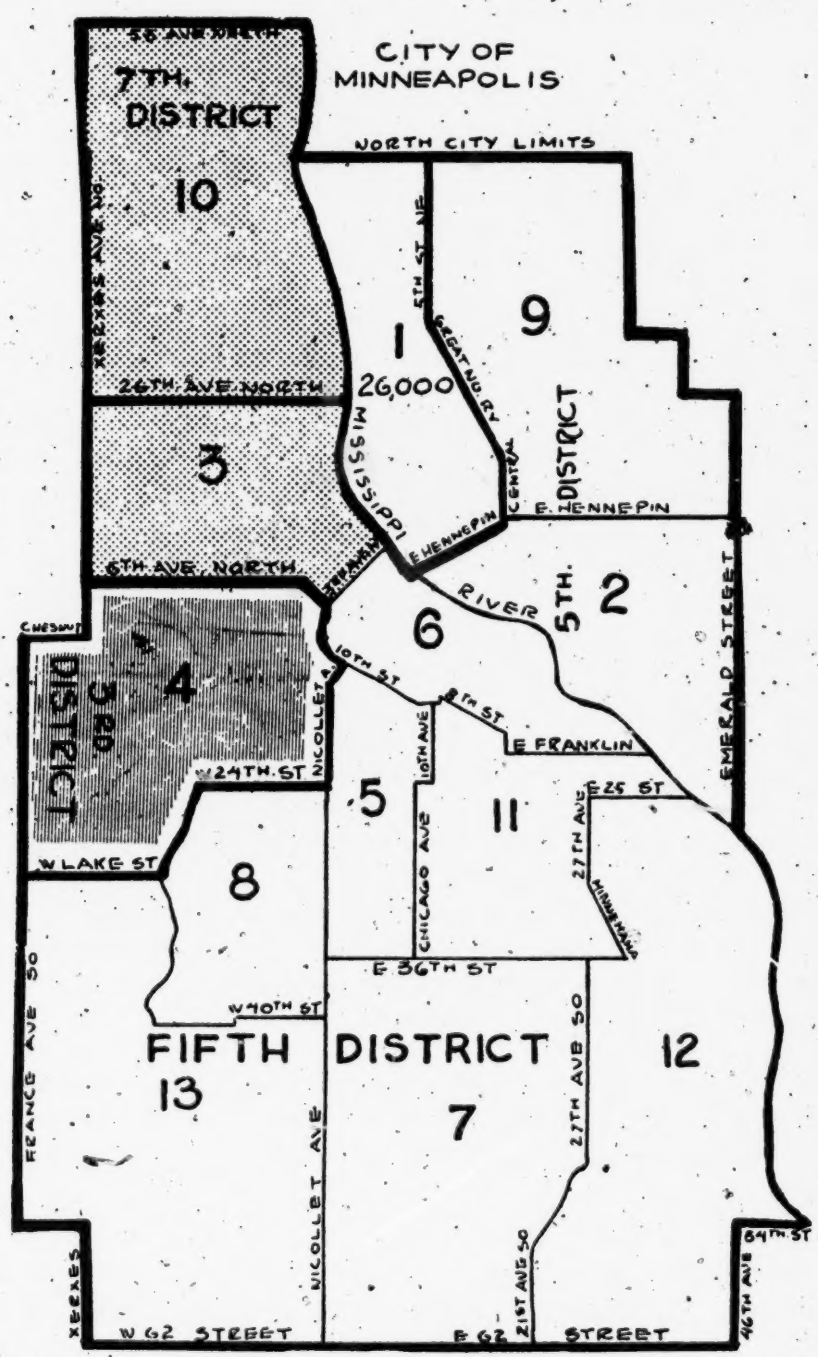


These maps show how Minnesota is divided into nine congressional districts and how Minneapolis is cut into three parts under the reapportionment act held valid by the state supreme court Friday. The map at left shows the state division. Under the act, as shown in the map at right the major part of Minneapolis comprises the fifth district, with the fourth ward a part of the new third district, and the tenth and third wards in the new seventh district, which extends westward to the state border. The reapportionment by the last state legislature was upheld by Judge Gustavus Loevinger of St. Paul in June, and the supreme court Friday confirmed his decision.

[fol. 20] EXHIBIT "B"

CITY OF MINNEAPOLIS:

Showing Congressional Districts under House File 1456



(Numerals indicate wards)

Wards 10 and 3 in 7th Congressional District.
Ward 4 in 3rd Congressional District.
All other wards in 5th Congressional District.

[fol. 21] EXHIBIT "C"

Memorandum of Trial Court on Demurrer

Prior to the fifteenth census, the state of Minnesota was entitled to 10 representatives in congress and had been divided into 10 congressional districts, in each of which one representative was elected. Under the fifteenth census taken in 1930 and the provisions of the congressional act of June 18, 1929, section 22-a, the number of representatives in congress from Minnesota was reduced to nine. The state legislature in April, 1931, in the usual manner passed a bill for an act, known as House File No. 1456, dividing Minnesota into nine congressional districts, from each of which a representative in congress was to be elected in the next congressional election.

When this act was presented to the governor for his approval or disapproval he returned it to the legislature with his veto, because of its alleged inequalities. The legislature as a whole took no further action, but the house of representatives passed a resolution ordering the bill to be filed with the secretary of state as a part of the permanent records of his office.

The secretary of state received and filed the act of the legislature, treating it as valid legislation, and received the filing fee of a candidate from one of the congressional districts for election as representative.

The petitioner herein attacks the act as invalid and seeks to enjoin the secretary of state from accepting any more filing fees and to compel him to return the filing fees already received. The secretary of state demurs to the petition.

Article I, section 4 of the federal constitution reads:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each

state by the legislature thereof; but congress may at any time by law make or alter such regulations except as to the places of choosing senators."

Article 4, section 1 of the Minnesota state constitution reads:

"The legislature shall consist of the senate and house of representatives which shall meet biennially at the seat of government of the state."

Article 4, section 11 and 12, of the Minnesota state constitution provide:

Every bill which shall have passed the senate and house of representatives in conformity to the rules of each house and the joint rules of the two houses shall, before it becomes a law, be presented to the governor of the state. If he approves, he shall sign and deposit it in the office of the secretary of state for preservation and notify the house where it originated of the fact; but if not, he shall return it with his objections to the house in which it shall have originated.

Thereafter, the legislature shall proceed to reconsider the bill, and if, after such reconsideration, two-thirds of the legislature approve of the bill, it shall become a law. It is further provided:

"Every order, resolution or vote requiring the concurrence of the two houses (except such as relate to the business or adjournment of the same), shall be presented to the governor for his signature, and before same shall take effect shall be approved by him or, being returned by him with his objections, shall *he* repassed by two-thirds of the members of the two houses according to the rules and limitations prescribed in case of a bill."

[fol. 22] Article 4, section 23 of the Minnesota state constitution reads:

"The legislature shall provide by law for an enumeration of the inhabitants of this state in the year 1865 and every tenth year thereafter. At their first session after each enumeration so made, and also at their first session after each enumeration made by the authority of the United

States, the legislature shall have the power to prescribe the bounds of the congressional, senatorial and representative districts, and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article."

Article 4, section 2, relates to the apportionment of representation in the two houses composing the state legislature, but is not pertinent to the issues involved in this litigation.

On August 8, 1911, congress, pursuant to its authority under article I section 4 of the federal constitution, enacted a law requiring that the states be redistricted under the thirteenth census, being the census of 1910, "in the manner provided by the laws thereof" in contradistinction to the phrase used in the federal constitution, "by the legislature thereof."

The redistricting act, as passed by the Minnesota legislature, instead of so dividing the state that the congressional districts shall be contiguous and compact, and that each of them shall contain approximately 283,000 inhabitants, provided that the fifth congressional district, including portions of the city of Minneapolis shall contain a population of 344,500, the seventh congressional district shall contain 326,391, whereas the first congressional district contains only 228,596. It is also claimed that territorially the districts are not "compact."

Shall the demurrer be sustained. The answer involves a determination (1) whether the word "legislature" as used in article 1, section 4, of the federal constitution means merely the members meeting at a stated time as contemplated by article 4, section 1, of the state constitution, or whether it means the entire legislative power of the state including the power of the governor to veto and the the consequent invalidity of any law not passed over his veto by a majority of two-thirds; (2) whether under article 4, section 23, of the state constitution the power to redistrict the state into congressional districts is specially conferred upon the state legislature and that the general provisions in article 4, sections 11 and 12, as to the governor's veto do not apply; (3) whether or not the congressional act of August 8, 1911, or any part of it is still in force and applicable; and (4) whether the alleged numerical and territorial

inequalities in house file No. 1456, also known as the redistricting act, authorized the court in declaring it null and void.

It is the contention of Petitioner Smiley, a citizen, taxpayer and voter, that the redistricting act is invalid because after its veto by Governor Olson the state legislature failed to pass it over his veto by the two-thirds vote required for the validity of all state legislation which has been vetoed under the state constitution, article 4, sections [fol. 23] 11 and 12.

This conclusion is based upon the claim, first, that the term "legislature" as used in article 1, section 4, of the federal constitution means the legislative power of the state as constituted under the state constitution, including not only the bicameral deliberative body ordinarily called the legislature but also the governor when he is a part of the legislative power through the veto and including the people themselves when by initiative or referendum they participate in the exercise of legislative power; and, secondly, that the act of August 8, 1911, is still in force and requires any redistricting act in Minnesota to be enacted according to the laws of Minnesota. He contends, further, that the inequalities in the redistricting act are so great that the court is authorized to and should declare it null and void.

The respondent, Mike Holm, secretary of state, appearing by the attorney general of the state, contends that the redistricting act is in full force and effect, for the reasons that, first, the term "legislature" as used in the portion of the federal constitution under examination applies to the body created and described in article 4, section 1, of the state constitution as the legislature; secondly, that the redistricting of the state for congressional elections is a special power vested exclusively in the state legislature by article 4, section 23, of the state constitution and is not subject to gubernatorial veto; thirdly, that the congressional act of August 8, 1911, is no longer in force; and, fourthly, that the alleged inequalities in the redistricting act present a political or legislative but not a judicial question.

1. The word "legislature" is used 11 times in the federal constitution and five times in its amendments. In the following instances the context leaves scarcely any room for

doubt about meaning attached to the term; the bi-cameral body, holding sessions periodically, seems to be indicated:

(1) Article I, Sec. 2, Cl. 1, and (2) Amendment XVII, Cl. 1, providing that the qualifications for electors for representatives in congress and for United States senators, respectively, shall be the same as the qualifications for electors in state elections for members of the most numerous branch of the state legislature;

(3) Article I, Sec. 3, Cl. 2, and (4) Amendment XVII, Cl. 2, providing, respectively, in the former that the executive may appoint a senator to fill a vacancy until the next meeting of the legislature and in the latter he may fill the vacancy if empowered by the legislature until the people fill it by an election;

(5) Article IV, Sec. 3, providing that the United States shall protect each state against domestic violence on the application of the legislature or of the executive (when the legislature cannot be convened);

(6) Article VI, Cl. 3, requiring that the members of the several state legislatures shall be bound by oath to support the federal constitution, and (7) Amendment XIV, Sec. 2, and (8) Sec. 3, referring to members of state legislatures.

In addition to the foregoing, the case of Hawke vs. Smith, 253 U. S. 221, 231, 40 S. Ct. 405, 408, 64 L. Ed. 871, enumerates the following uses of the word "legislature" as having reference to the bicameral body and not to the legislative power of the state.

(9) Article I, Sec. 3, Cl. 1, providing for the choosing of United States senators by the legislature of the states;

[fol. 24] (10) Article I, Sec. 8, Cl. 17, providing for the purchase by the United States of places for public purposes by the consent of the legislatures of the states in which the same shall be;

(11) Article IV, Sec. 3, Cl. 1, providing that no state shall be formed by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned;

(12) Article V, providing for the ratification of amendments to the federal constitution by state legislatures.

The word "legislature" appears in four other places in the federal constitution and its amendments.

(13) Article V, in addition to providing for the ratification of an amendment to the constitution by the legislatures of three-fourths of the several states, also provides in the same sentence that congress, on the application of the legislatures of two-thirds of the several states shall call a convention for proposing amendments. The language and the purpose of these two provisions, the one bearing on the application by the legislature for a convention to frame proposed amendments, and the other on the ratification by the legislature of the proposed amendments, are so similar, the only difference being that the former requires only two-thirds of the legislatures while the latter calls for three-fourths of the legislatures, it seems super-ogatory to say that the term "legislature" must mean the same in both parts of this article. Any other construction is not likely to be claimed.

(14) Article II, section 1, Cl. 2, of the federal constitution, reads:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress."

These electors are to elect the president. This clause was under consideration in two cases, Re Opinion of the Justices (Me.), 107 Atl. 705, 5 A. L. R. 1407, and McPherson vs. Blacker, 146 U. S., 1, 36 L. Ed. 869.

The precise point in the Maine case was whether an act of the legislature granting women the right to vote for presidential electors was within the operation of a constitutional amendment requiring submission to the voters, upon request, of any act, bill, resolve or resolution passed by the legislature. This involved the construction of the term "legislature" as used in this portion of the federal constitution.

The justices of the state of Maine held that the clause there being considered clothed each state with the absolute power to appoint electors in such manner as it may see fit without any interference of control on the part of the federal government, and that the clause "in such manner as

the legislature thereof may direct'' simply means that the state shall give expression to its will as it must of necessity through its law-making body, the legislature.

And it further held that the act of the legislature must be passed and become effective in accordance with and in subjection to the constitution of the state, like all other acts and resolves having the force of law.

[fol. 25] Although this is the pivotal point in the case, it is not supported by the citation of any authorities nor amplified by reasoning. The opinion is not persuasive. The effect of the opinion is that the term ''legislature'' as used in Article II, section 1, Cl. 2, is struck out and the word ''state'' is substituted. It holds that the use of the expression ''in such manner as the legislature thereof may direct'' is not a limitation on the power of the state to control the legislature. It makes use of — words meaningless and surplusage.

In the second case in which this clause of the constitution was under scrutiny, the McPherson case cited above, the question was whether the legislature of the state of Michigan could direct that presidential electors be elected from district- coterminous with congressional districts or whether they had to be appointed at large. On the one hand, it was claimed that since the appointment was made by the state, it had to act as a political entity on each elector and the provision for election from districts was in violation of Article II, Sec. 1, Cl. 2. In opposition thereto it was claimed that since the appointment was to be made as the legislature directed, its discretion was unlimited. The supreme court in the course of its opinion said (36 L. Ed. at P. 874):

''The clause under consideration does not say that the people or the citizens shall appoint, but that 'each state shall'; and if the words, 'in such manner as the legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence, the insertion of these words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power cannot be held to operate as a limitation on that power itself.''

The determination of the issues in the McPherson case did not require a definition or interpretation of the term "legislature" as there used, but it did decide that the use of the word "legislature" was not surplusage; that ordinarily the legislature has unlimited legislative power and if there is nothing in the state constitution to the contrary the act of the legislature is the act of the state through its legislative power; and it seems to hold that the insertion of the phrase, "in such manner as the legislature thereof may direct" is not a limitation on the power of the legislature but is a limitation on the state in respect to any attempt to circumscribe the legislative power of the legislature, by constitutional limitations on that power.

The opinion of the justices of Maine is not in harmony with the apparent holding of the United States supreme court in the McPherson case. The latter case is not only controlling as authority but is sounder in its reasoning.

(15) Attention is also called to Amendment XVII, Cl. 2, in which an election to fill a senatorial vacancy is contemplated "as the legislature may direct." In the first clause of this amendment the word legislature from the context defines itself. In the second clause the juxtaposition of "legislature" and "executive" certainly gives strong color to the view that the word "legislature" is used in its obvious and organic sense.

The deliberate choice of the words "the legislature of any state," rather than the words "the state" or the words "the state by law" tend to show that the legislature and not the legislative power is meant. Hence, one must con- [fol. 26] clude that the term "legislature" used in the last line of the same clause can hardly have been used in any different sense. Nor should it be forgotten that the XVIIth Amendment came in response to a demand for the popular election of senators after the courts had declared that under Article I, Sec. 3, Cl. 7, of the federal constitution, providing for the election of senators by state legislatures, the power of the state legislature was exclusive and not subject to the control of state constitutions.

(16) This disposes of all references to the state legislature in the federal constitution adversely to the claims of petitioner except Article 1, Sec. 4, Cl. 1. This clause was construed in two state and one federal decision. The first

in point of time was the case of state ex rel. Schrader vs. Polley, (1910) 26 S. D. 5, 127, N. W. 848. In that case the question involved was whether a redistricting act passed by the legislature of the state of South Dakota was valid before it was submitted by referendum to the people as required by the constitution of the state.

The court held that the act of the legislature was not valid until it was so submitted. It placed its opinion upon the ground that the redistricting act of the state legislature is in all things the same as any other law, that it is subject to the same constitutional limitations as to the manner of passage, approval, veto, and referendum as any other law that may be passed by the legislature.

It bases its decision upon the opinion that no power to divide the state into congressional districts was ever delegated to the legislature of the state by Article I, Sec. 4, of the federal constitution. It holds that this clause of the constitution does not delegate the power to the state legislature or to the state itself to regulate such elections because the state already in its sovereign capacity possessed that power and that the federal constitution simply left that power with the state where it already reposed.

The court goes farther and holds that the world legislature as used in this part of the constitution does not mean simply the members who compose the legislature acting in some ministerial capacity, but refers and means the law-making body or power of the state as established by the state constitution and which includes the whole constitutional law-making machinery of the state.

It appears to this court that the learned supreme court of South Dakota erred in assuming that a state legislature in providing for the time, place and manner of electing representatives in congress is exercising a power reserved to the people of the state of South Dakota and inherent in them without regard to the grant of power in the federal constitution.

There can be no inherent power in the people of South Dakota to legislate for any one except themselves. There can be no inherent power in the people of the state to adopt a federal constitution or to amend the federal constitution which is to govern the inhabitants of other states and territories. As a matter of fact, that constitution may be amended and they may be subjected to the effects of such

amendment without their consent and contrary to their expressed wishes.

[fol. 27] The representatives in congress are officers of the federal government. They legislate for all the people of the United States. They govern the District of Columbia, the territory of Alaska and the island possessions of the nation. It does not sound plausible that any state may claim that it has inherent power or control over legislative, executive or judicial officers who are performing exclusively federal functions.

The state does not have inherent power to determine who shall vote in a federal election, whether it be for president, senators or representatives. The right to vote in such an election is derived from the federal constitution exclusively. The federal government determines the term of office, the duties, powers and rights and the compensation of senators and representatives. It determines their apportionment to the several states. It is a federal election to choose federal officers by federal electors. Ex. p. Yarbrough, 110 U. S., 651, 28 L. Ed. 274; Felix vs. U. S., 186 Fed. 685.

Congress has already fixed the time for congressional elections. U. S. C. A. title 2, Sec. 7. Nothing is left to the states except through their legislatures to fix the places of election. As in the case now before the court, so in the Schrader case, this was done by districting the state. It does not seem to be either an inherent and reserved power of the people of the state nor does it appear to be state legislation subject to the state constitution.

The same clause came up for judicial consideration next in Ohio, in State ex rel Davis vs. Hildebrandt, 94 Ohio, St. 114 N. E. 55. The question there involved the validity of a redistricting act duly passed by the state legislature, approved by the governor but rejected by the people in a referendum vote.

The supreme court of Ohio held the act invalid upon two grounds first, that under the congressional act of August 8, 1911, the redistricting of states under the thirteenth census was to be done "in the manner provided by the laws thereof." U. S. C. A. Title 2, Sec. 4; and, secondly, that the expression "legislature," as used in Article I, Sec. 4, of the federal constitution meant the legislature of the state subject to all the provisions and limitations of the state con-

stitution including the governor's veto and popular referendum.

The reasoning upon the second point was similar to the Schrader case and other cases referred to and overruled by Hawke vs. Smith, 253 U. S. 220, 64, L. Ed. 871, 10 A. L. R. 1504. The case was appealed to the United States supreme court. Ohio ex rel Davis vs. Hildebrandt, 241 U. S. 565, 60 L. Ed. 1172. The supreme court of the United States decided this case on three grounds.

(1) The decisions of the state supreme court on what constituted valid legislation under the state constitution and laws was conclusive on the federal supreme court; (2) the attack upon the decision of the state supreme court holding the state redistricting law to be invalid because not passed as required by the congressional act of August 8, 1911, is without merit; and (3) the contention that to include the referendum within the state legislative power for the purpose of apportionment is repugnant to Article I, section 4, even if sanctioned by congress, because based on the assumption that the referendum annihilates representative government is without substance.

[fol. 28] It is clear that this case does not undertake to define the meaning of the term "legislature" as used in Article I, section 4, nor does it decide that under this section, in the absence of congressional regulation, a redistricting of the state under a congressional re-apportionment by the state legislature is void unless done in accordance with the state constitutional requirements. All that was actually involved and decided so far as pertinent here is that the congressional act of August 8, 1911, directed the state to be redistricted according to state laws rather than by the state legislature and that the attempted redistricting of the state of Ohio by the state legislature was ineffectual because not done according to its legal requirements.

The clause now under discussion came under the judicial eye of the United States supreme court again a little later in the case of Hawke vs. Smith above referred to. The court referred to Article I, section 4, in order to answer the argument that the Hawke vs. Smith case in holding that the state legislature, unhampered by state constitutional provisions, has the exclusive power to ratify an amend-

ment to the federal constitution was inconsistent with the Davis vs. Hildebrant case.

The opinion points out that the two cases are inapposite. The Davis vs. Hildebrant case construed an act of congress. The act itself, it was pointed out, recognized the referendum as part of the legislative authority of the state for the purpose stated. The constitutionality of the Ohio law was conceded.

No case has been called to the court's attention or been found by the court after diligent search in which the word "legislature" as used in any state constitution or in any state or federal law was ever construed as meaning the legislative power of the state or the entire legislative machinery of the state.

Those cases which construe the word "legislature" as used in the federal constitution to mean the legislative power of the state do it upon the theory either that the power exercised is not dependent on the federal constitution but is a power reserved to and inherent in the people of the state to be exercised as they see fit (Schrader vs. Polley) or that whenever the legislature acts, whether under state or federal authority, it can act only in the manner contemplated by the state constitution from which alone it gets its potency. (State vs. Hildebrant, 114 N. E. 55).

The untenability of both these views is conclusively established in the Hawke vs. Smith case by the U. S. Supreme Court, unless an inference may be drawn that the framers of the constitution used the word in two different senses and a distinction can be made between its use in Article I, section 4, and perhaps Article II, section 1, and its use in other parts of the constitution. It is claimed this very distinction was made in Hawke vs. Smith, 253 U. S. 220, in the following language:

"Article I, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the constitution as to the expression or assent or dissent to a proposed amendment to the constitution. In such expression no legislative action is authorized or required."

It is contended on behalf of petitioner that by this language the supreme court of the United States distinguishes

between the use of the word legislature in Article V and its use in Article I, section 4, and construes the latter as the equivalent of the legislative power of the state, while the former means the bicameral body.

[fol. 29] It is quite true that in ratifying an amendment the legislature frames no legislation, an affirmative vote has no effect unless and until a sufficient number of other legislatures have concurred, and the effect of the amendment is not limited to the geographical jurisdiction of the legislature, whereas in prescribing the places of a congressional election the legislature not only votes but frames the legislation, its affirmative vote is at once effective and its effect is limited to the state. But this functional distinction does not hold good as to powers given to or duties put upon the state legislature in other parts of the constitution.

Thus, in applying to congress for a constitutional convention in consenting to the sale of land to the government and in consenting to the forming of a new state out of portions of its own territory it must draft appropriate legislation, must deliberate upon it, must vote upon it and to some extent at least its actions go into effect at once and are limited in territorial consequences to their own states.

In all these respects, as well as in directing how a senatorial election shall be held, it is legislating. But why should not the legislature legislate in performing federal powers or functions? Is it to be assumed that the framers of the constitution used the word "legislature" in its obvious and legally proper sense when they wanted it to perform non-legislative functions but as soon as they imposed on it functions more nearly legislative they did not mean the legislature at all?

As a matter of fact, the language of the supreme court last above quoted is technically correct, for if the entire fourth section of Article I be construed in the light of legislative power granted not only to the state legislature but also to congress the result is ample power in the state to legislate. But the statement there made must be construed with reference to the subject under discussion, namely, the situation in the case of State vs. Hildebrandt, as distinguished from the situation in the case of Hawke vs. Smith. In the latter the act of the legislature was clearly dis-

tinguishable from legislation and hence not comparable to a legislative act of redistricting. But it does not follow because a "state" has the legislative power to enact a redistricting measure "within the limitations" of article I, sec. 4, that the word "legislature" as there used means the legislative power of the state, or that the court intended to be so understood.

That in many places the constitution uses the word "legislature" in its organic, bicameral sense, is established textually and judicially. Before the court can reach the conclusion that the same word was used in a fundamentally different sense in one or two instances in the same instrument, something more than a mere difference in the character of the services to be performed should appear. The intent should be apparent from the instrument. It should not be necessary to be read into it by a process of interpretation and interpolation.

[fol. 30] Another coincidence which ought to be given weight is the fact that article I, section 4, requires the legislature in the same clause and by the same grant to prescribe the times, places and manner of "holding elections for senators and representatives." But the legislature alone, unhampered by state constitutions, voted for senators. Naturally, it alone was interested in the time, place and manner of exercising its power of voting for senators. Not even congress could tell the legislature at what place it should vote for senators.

Yet, if the contention of the petitioner is sound, then the constitution uses the same word at the same time in two senses, in the sense of the legislature when it fixes the place or the time or the manner for its vote on senators, and in the sense of the legislative power of the state when it fixes the time, the place or the manner of voting for representatives. The result once more demonstrates the difficulties in which the court becomes involved when it attempts to "interpret" a term contrary to its plain, usual and obvious meaning.

As a further aid to interpretation, it may be well to check the soundness of the theory that the framers of the constitution used the term "legislature" in its usual and obvious sense by an examination of the entire instrument.

U. S. vs. Morris, 1 curt. 23, 26 federal cases No. 15815; McPherson vs. Blacker, 146 U. S. 1, 13, S. ct. 3, 36, L. Ed. 868. The framers of the constitution referred to numerous rights to be exercised through various agencies.

They made use of the congress, the legislature, the executive, the state, and did not fail to refer to "appropriate legislation by the state." There is no internal evidence that they used any of the terms employed inadvertently, inaccurately or superfluously. Holmes vs. Jennison, 14 Pet. 540, 10 L. Ed. 579. On the contrary, it has been called "an instrument of exact expression." Myers vs. U. S., 272 U. S. 52 (p. 233), 71 L. Ed. 160 (p. 214, subd. XVII. Upon this assumption every word and phrase must be given effect. Blake vs. McClung, 172 U. S. 239, 19 S. Ct. 165, 42 L. Ed. 432; Knowlton vs. Moore, 178 U. S. 41, 20 S. Ct. 474, 44 L. Ed. 969.

Thus, as the appropriate agency designated by the federal constitution, the legislature shall "choose" federal senators, "fill" senatorial vacancies, "prescribe" the time, place and manner of holding elections for senators and representatives, and "direct" how the state shall appoint presidential electors. In the same capacity the legislature may "apply" to the United States for protection against domestic violence, "apply" to congress to call a constitutional convention, "ratify" an amendment to the federal constitution "consent" to the purchase of land from the state by the United States, "consent" to the formation of a new state out of portions of its own territory.

But if a criminal escape from one state to another, the state harboring him must deliver him upon the demand of the executive of the state from which he fled (Article IV, Section 2, Cl. 3); if a vacancy occurs in representation from any state, the executive authority shall call an election to fill it (Article I, Section 2, Cl. 4); if a vacancy occurs in the senate, the executive may make temporary appointment (Article I, Section 3, Cl. 2); if the legislature cannot be convened, the executive may ask for protection against domestic violence (Article IV, Section 4).

[fol. 31] And by contrast, when a state cedes territory to the United States (Article I, Section 8, Cl. 17) or when it consents to surrender its equal representation in the senate (Article V), it acts in its corporate or full legislative capacity. So must the original states have acted

prior to 1808 when they admitted the importation of such persons as they thought proper," Article I, Section 9. Each state reserves to itself authority to train and to appoint the officers of the state militia (Article I, Section 8, Cl. 16). Amendment XVIII may be enforced by the state "by appropriate legislation." A state may ratify an amendment to the constitution by a convention (Article V) as well as by the legislature, although neither the state, nor its executive, nor a convention, but only "the legislature" may request that amendments be proposed. On the other hand, the restrictions or prohibitions put upon a state are never directed to its legislature or its executive but upon the state in its entire corporate capacity.

Moreover, it would seem as if the framers of the constitution, wherever it was likely that the federal government would come in frequent contact with the state government or wherever it delegated or relied upon a state for the performance of one of the objectives of the union, specified the agency within the state with which it would deal or on which it relied.

As vacancies in the congress ought to be filled promptly, both the executive and the legislature were charged with duties and powers to fill them. The government might often need grounds for public purposes within a state. The constitution designated the legislature as the party to deal with. The relationship was different where the state ceded territory to the United States, hence no such designation. Since a special electorate was to elect the national president, a most important task, a special agency, the legislature was nominated to direct how the state was to appoint such electors.

The establishment of justice required the unquestioned right of extradition. Hence, the proper state agency to demand a fugitive was designated, namely, the executive. It is interesting to note that if a slave escaped, merely his owner might make the demand for his surrender. (Article IV, Section 2, Cl. 3.) Another important purpose of the Union was domestic tranquility; hence, the naming of the legislature and the executives as the proper parties to apply to for aid against domestic violence.

That amendments to the constitution would be proposed was forecast. The national government would be

vitally interested in knowing with whom it is dealing. Hence, Congress might refer the matter of ratification to state legislatures or direct the calling of state conventions. Loyalty to the federal government is of prime importance. The federal constitution was the supreme law. Positive duties were placed on the state legislature, the state executive and the state judiciary under it.

Hence, they were all required to take an oath to support it. (Article VI.) Nothing with reference to federal elections was left exclusively to the states. It was too important to the life of the nation. Hence, the agency to prescribe the times, places and manner of electing senators and representatives was definitely fixed as the state legislature. But lest it fail to act or act ill-advisedly, congress, as in a number of other instances, was given supervision and control. Article 1, Section 4, Cl. 1. (See for similar provision Article 1, Section 10, Cl. 2.)

[fol. 32] Another reason presents itself why the constitution makers carefully and clearly designated the state agency to perform specified functions, free from local or popular interference or control.

The founders of the government had but lately emerged from a war against a tyrannous sovereign in the shape of a king. They were intent on establishing a government in which through checks and balances tyranny would be impossible. They were creating a new sovereign, the people. It was still uncertain whether the new sovereign, if made incompetent by ignorance, or misled by demagoguery or inflamed by passion might not be as tyrannous as the old.

A new nation was being brought forth, conceived in new ideals and dedicated to a new governmental experiment. The states mistrusted the national government. The nation was not sure of co-operation of the states. The people feared for their liberties and their leaders did not wholly trust the people. In fact, in the original constitution very little was left to popular action. No federal executive officer was elected by the people nor did the states have any voice in the appointment of any federal officer.

The president and vice president were elected by a specially appointed body of men exactly equalling the number of senators and representatives in congress, none of whom could hold any other federal office. It was to be a small

group exercising its independent judgment. Even these were not chosen by the people. No federal judicial officer was elective nor did the states have any voice in their selection. Federal senators were to be elected by the state legislatures. They were to be an aristocracy in statecraft. It was feared the people might not choose senators wisely. A legislature was more to be trusted with that task. In the selection of representatives in congress, and in that only did the people have a voice. In fact, the people are mentioned in the original constitution only in the preamble and in article 1, section 2, cl. 1. They were treated better in the amendments. (See am. 1, 2, 4, 9, 10.)

But their active participation in the federal government in peace times prior to the extension of the ballot in senatorial elections by the XVIIth amendment and the popularization of the vote for presidential electors through political action was extremely limited. Not only were the people denied the elective franchise in the selection of all officials except representatives in congress but they were not even given the right to determine by what body, whether the legislature or a constitutional convention, an amendment to the federal constitution should be ratified.

In all but a very few of their possible dealings with the federal government the state was required to act through its legislature or its executive and not through its legislative power. In view of this attitude by the national government toward the states, it is not surprising to find that in the matter of fixing the times, places and manner of electing representatives in congress the same caution was shown and the duty to prescribe regulations were definitely cast upon the state legislatures. Even the legislatures were subject to congressional surveillance, so great was [fol. 33] the fear of popular opposition to the central government.

It may be urged that in interpreting the construction one should not sacrifice the spirit to the letter; that where popular control over legislative action is concerned one should adopt a liberal rather than a strict construction; and that where important public policies are involved one should lean toward a broad rather than a narrow view. If a conclusion contrary to what is herein expressed could have been arrived at by the application of the foregoing princi-

ples of interpretation, the court would not have hesitated to make the application.

But the court believes that its action in this case is controlled by a different cannon of interpretation, an even more important principle of judicial action. The question here is whether the court, under the guise of judicial interpretation, can in effect amend the constitution by substituting for the word "legislature" in Article I, section 4, the word "state" or the expression "legislative power of the state."

Criticism has from time to time been directed against the courts for their alleged usurpation of legislative powers by reading into constitutional clauses restraints upon the legislative policies beyond what was originally intended. It seems to this court that it would be a clear and indefensible act of judicial legislation if the court would construe the word "legislature" in the enlarged and comprehensive sense of "the state." The former is a well defined, well recognized branch of the state created by the state for a specific purpose. It ought not by interpretation to be construed as being synonymous with the state or with the whole legislative machinery of the state. So, to hold seems an unwarranted amendment of the federal constitution by striking out a word having a clearcut connotation, and substituting for it another word or phrase with greatly different connotations. The courts may not thus juggle with constitutional law.

Why should the framers of the constitution use a precise expression such as "legislature" at least 14 and possibly 15 times in the constitution and its amendments in one sense and then in one or at the most two other places use it in a different sense? Surely the possibility of confusion and conflict as to its meaning must have occurred to them.

It would have been easy for the framers of the constitution to have used an expression indicating that presidential electors shall be appointed and the times, places and manner of electing representatives shall be prescribed by the state or by law or by the state through its legisative power so as to bring out the difference, as was done in the XVIIIth amendment, if such distinction was intended to be incorporated in the constitution. If none was intended, the court may not find one by its power of interpretation.

There is nothing technical in this interpretation. It does not defeat the general principles of representative govern-

ment. It is not an interference with state rights. It is merely restricting the exercise of a certain federal function in accordance with the unambiguous language of the federal constitution to a branch of the state government created by and according to the constitutional wishes of the people of the state. Should the legislature which for the time is the agency of both the federal government and the state in the performance of the function of redistricting the state, perform its duties unacceptably, it lies within the power of congress to remedy the wrong.

[fol. 34] It will be urged that in Minnesota and elsewhere the construction here put upon the constitution is contrary to the practical construction given it by state legislatures and governors for many decades. Such construction may be resorted to in aid of the true meaning when the meaning is open to doubt. But, as was so clearly and convincingly established by the supreme court of Minnesota in the recent case of State ex rel University of Minnesota vs. Chase, 175 Minn. 259, 220 N. W. 951, constitutions cannot be amended by the doctrine of waiver or estoppel or non-user or even universal usage and custom. A different rule may prevail in a country which has no written constitution. In America it is the intent that must control the court. When that intent appears to be clear, the duty of the court is equally clear.

Summarizing this branch of the case and surveying the situation as a whole, the conflict between the legislatures as the creatures of the state and subject to its control and the legislatures as designated agencies of the federal government for the performance of federal functions free of state control, has centered around four constitutional propositions (1) the manner of appointing presidential electors. (2) the redistricting of the states in congressional elections; (3) the election of senators by the people; and (4) the right of the people by referendum to participate in amending the federal constitution.

It is apparent that the issues involved are not merely matters of constitutional construction but have been at times somewhat obscured by matters of political policy. There has been a constant struggle by the people to obtain a larger and more direct control in federal affairs. In the executive department this has manifested itself by dissatisfaction with the constitutional method of electing the

president and vice president. In the legislative department it has resulted in an amendment to the constitution providing for the popular election of senators. Through the primary election the voice of the voter made itself heard in legislative halls on senatorial elections even before the constitution was amended. Through the referendum the people sought to have a voice in the amendment of the constitution itself. The battles were frequently waged in the courts. The courts were divided, some construing the constitution in accordance with its historic and in its more obvious sense, some construing it in line with the political policies of the day. So far as popular participation in the election of senators was concerned, the struggle ended with the adoption (1913) of the seventeenth amendment.

So far as popular participation in amending the federal constitution was concerned, it ended with the case of Hawke vs. Smith (1920) in the supreme court of the United States. So far as popular voting for the president and vice president is concerned, it is accomplished through depriving presidential electors of any independent indiscretion and making them merely the agents of political parties. In 1911 at the request of the representatives of Ohio in the federal senate, congress resolved to subject the power to redistrict the states to the legislative power of the state including the referendum where it existed. In 1931 congress did not see fit to take any such action. The constitution has not been amended.

[fol. 35] Political policies are matters for legislatures, legislative agencies and voters. Where the language of the law is clear and unambiguous, the courts may not brush it aside, no matter how meritorious the political arguments or how objectionable the written enactments. As the supreme court of the United States said in Hawke v. Smith:

"There can be no question that the framers of the constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had, they were no less accurate in the use of apt phraseology to carry out such purpose."

Having in mind these considerations, the court concludes that Article I, Section 4, of the federal constitution was in-

tended by its framers to empower and require the state legislature and not the legislative power of the state to prescribe the times, places and manner of electing representatives in congress, subject only to the supervision and control of that power by congress itself.

2. It is argued with considerable vigor that under the Minnesota state constitution the redistricting act of the state legislature is valid, even though the reference to the state legislature in the federal constitution would bear the interpretation that is sought to be placed on it by petitioner. Article IV, section 23, provides that after each state and federal census "the legislatnre shall have power to prescribe the bounds of congressional, senatorial and representative districts and to apportion anew the senators and representatives among the several districts."

It is argued that this is a special provision giving the state legislature specific powers and that the powers given to the legislature by this section are not subject to the general provisions of Sections 11 and 12 of the same article requiring gubernatorial action on every "bill," "order," "resolution" or "vote." There is some force to the argument. But this force is greatly diminished by the fact that the federal and state functions were intermingled. As to the state functions, no good reason exists why they should not be subject to veto.

The argument is weakened still more by a casual inspection of the state constitution which shows that it contains a great number of similar specially enumerated duties, powers and functions. If all of these escape the possibility of the executive veto provided for in Article 4, Sections 11 and 12, the governor of Minnesota has very limited legislative responsibilities. On the whole, the claim appears to be without sufficient merit to be made a basis for upholding the act of the legislature. It must rest upon federal sanction or fail.

3. Unless the Act of 1911 is still in force, there is no congressional legislation prescribing how the several states shall be redistricted. The Act of 1911, paragraph 4, provided for the election of representatives from the districts existing on August 8, 1911, "until such state shall be redistricted in the manner provided by the laws thereof." There was no mention in this act of redistricting by the

legislature. On the contrary, the word "legislature" was studiously and intentionally avoided. In its place congress directed the redistricting to be done in the manner provided by the state laws.

In only one decision has the statute been construed. In [fol. 36] State vs. Hildebrant, 94 Ohio St., 154, N. E. 55, this very law was construed to take the power out of the exclusive jurisdiction of the state legislature and put it into the hands of the legislative power of the state. Under the language quoted there can be no quarrel with this decision. The supreme court of the United States on an appeal in the same case (241 U. S. 565) held that under this language a redistricting act had to be passed in Ohio according to its laws.

If this law were still in force and constitutional, it would be decisive of the issues. But it is no longer in force. The title of the act of August 8, 1911, read, "an act for the apportionment of representatives in congress among the several states under the thirteenth census."

Section 1 of this act provided for the total number of members in the house of representatives and apportioned them among the several states. This section clearly is now of no further effect. Section 2 provided for the contingency of New Mexico and Arizona entering the union as states. It has no application to the present situation. Section 3 provides that any state "entitled under this apportionment to more than one representative" shall be divided into the same number of districts as it has representatives, each district to elect only one representative, and provides that such districts shall be compact, contiguous and contain as nearly as practicable an equal number of inhabitants. Congress may change its ideas as to the mode and manner of redistricting states under some other congressional reapportionment.

The court would have to read into this section the words "and subsequent reapportionments," in disregard of its title and express language, in order to give it vitality when the reapportionment under the thirteenth census is at an end. Courts have no power to amend legislative acts however desirable such an amendment might seem to be. Section 3 expired by its own limitations when the apportionment it undertook to regulate had ceased to be in force. For precisely the same reason, section 4 of the Act of 1911

has no further legislative power. This law was clearly a temporary law enacted for a specific purpose and a limited period of time. When that purpose was accomplished, when the period had come to an end, the legislation came to an end with it. The Act of 1911 is no longer on the scene.

The point has been made that even if the act of 1911 or any of its sections were permanent legislation, insofar as it attempted to vary the powers conferred on the state legislature by article I, section 4, it was unconstitutional and void. It is claimed that in State vs. Hildebrant, supra, the constitutionality of the act of 1911 was not raised, argued or decided. Under the views already expressed by the court, it is unnecessary to determine this issue. Some of its constitutional aspects were however apparently raised, argued and decided in that case.

4. In his message to the legislature, as set forth in plaintiff's petition, the governor of Minnesota vetoed the bill because of numerical inequalities in the redistricting plan adopted. These inequalities are undeniable. They appear to justify the governor's strictures. Under the view of this court, that the act of 1911 has no application to the appor- [fol. 37] tionment under the fifteenth census, there is no federal, legislative or constitutional provision requiring congressional districts to be compact, contiguous and as nearly equal in population as practical. Consequently, this court cannot hold the act violative of any federal mandate. Neither is there any state nor constitutional requirement, which, if it were applicable, could be invoked to support a judicial veto of the act. Perhaps if the numerical inequalities were so gross as to be in effect a denial of representation to a substantial portion of the population or so arbitrary and unreasonable that the court would be justified in concluding that the act amounted to a failure to redistrict or if it were palpably corrupt, the court might set the act aside upon the ground that the legislature had failed to exercise any legislative discretion at all. But that is not the situation. The voters in the fifth congressional district with a population of 344,500 may complain that they have been treated unfairly as compared with the voters in the first congressional district with a population of 228,596. That presents a legislative or political, not a legal question, and calls for action by the voters or legislators of the state, not by the courts. Even if the act of 1911 were

in force, it is doubtful whether under the principles just stated that act would justify judicial interference.

Loevinger, J.

[fol. 38] [File endorsement omitted]

EXHIBIT "D"

IN SUPREME COURT OF MINNESOTA

No. 192. 28679

THE STATE OF MINNESOTA Upon the Relation of W. YALE SMILEY, Appellant,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, Respondent

Wilson, C. J., Dibell, J., & Stone, J., Dissenting

Syllabus

1. The apportionment act of the congress of August 8, 1911, 37 St. L. 13, was superseded and replaced by an act of the seventy-first congress approved June 18, 1929, entitled "An act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of representation in Congress."

2. The word "legislatures" as used in the United States Constitution, Art. I, § 4, is construed as meaning the representative body which makes the laws of the state; not synonymous with the law-making power of the state; and does not include the governor of the state.

In making a congressional apportionment the state legislature acts exclusively under said Art. I, § 4 and does not act strictly in the discharge of legislative duties as a law-making body, but as an agency responding to a federal mandate.

3. The majority vote of the Senate and House of Representatives in redistricting the state for congressional purposes under Art. I, § 4 was effectual though the matter was put in the form of a bill, in the form of a law.

4. Upon the record there is no room for the application of the doctrine of practical construction.

5. Upon the record the court could not interfere with the division of the state upon ground of inequality of population and want of contiguity even upon the hypothesis that the provisions of the act — 1911 still prevailed.

6. Since we have held that the act of 1929 supersedes [fol. 39] and wholly replaces the act of 1911, and that the authority under the former is unrestricted, unlimited and absolute, it follows that the action of the legislature in the performance of their duty thereunder is beyond the reach of the judiciary.

7. It is held that the determination of the legislature, as more fully stated in the record, in no way violates the fourteenth amendment to the United States Constitution.

Affirmed.

OPINION—Filed Oct. 9, 1931

WILSON, C. J.:

The appeal is from an order sustaining a demurrer to the petition of relator, a citizen and taxpayer, on the ground that it did not state facts sufficient to constitute a cause of action.

These proceedings arise from an act of the seventy-first congress, approved June 18, 1929, entitled, "An act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of representatives in Congress." The effect of the act was to reduce Minnesota's representatives in the House of Representatives of the Congress of the United States from ten to nine members. Intending to divide the state into nine congressional districts, there was introduced in the House of Representatives in our state legislature a bill known as H. F. 1456, and which in form specified the counties to constitute each of such nine districts. This measure passed the House on April 16, 1931, and the State Senate on April 20, 1931. It was transmitted to the Governor who promptly returned it to the House, where it originated, without his approval and with his written objections which in form constituted a veto. Two days later the House adopted the following resolution, to-wit:

"Whereas, on the 16th day of April, 1931, The House of representatives of the State of Minnesota duly passed H. F. No. 1456, a bill for an act to divide the State of Minnesota into nine Congressional Districts, and

[fol. 40] "Whereas, on the 20th day of April, 1931, said H. F. No. 1456 was duly passed by the Senate of the State of Minnesota; and

"Whereas, said bill is now in the possession of the House,

"Now, therefore, be it resolved, That the Chief Clerk of the House be and he is hereby directed to deposit for filing with the Secretary of State the enrolled copy of said H. F. No. 1456, said bill to become and remain part of the permanent records of the office of the Secretary of State."

Five days later H. F. No. 1456 was deposited with the Secretary of State in accordance with the terms of the foregoing resolution.

The population of the various congressional districts as specified in H. F. 1456, as shown by the census of the United States for the year 1930 was as follows:

"First congressional district	228,596
"Second congressional district	251,734
"Third congressional district	291,601
"Fourth congressional district	286,721
"Fifth congressional district	344,500
"Sixth congressional district	301,984
"Seventh congressional district	326,391
"Eighth congressional district	276,633
"Ninth congressional district	253,786"

An equal division of our population of 2,551,586 would allocate 283,509 inhabitants to each congressional district.

It is the duty of the secretary of state to receive filin- of candidates for nomination to the office of representative in congress from all persons eligible to be candidates thereat; and to refuse such filings for nomination thereto when persons tendering the same appear to be ineligible. He also has charge of the printing of all necessary ballots, the expense of which is usually greater than the income from filing fees.

Soon after the adjournment of the 1931 session of our state legislature, a controversy arose as to whether the legislature had in fact prescribed the congressional dis-

tricts in the state or whether the governor's veto had invalidated the efforts of the Senate and the House. The secretary of state claiming the governor's veto was a nullity acted upon the theory that new districts had been [fol. 41] created and accepted a filing fee from one or more persons as candidates in at least one or such districts and refused to accept filing fee from one who sought to be a candidate at large upon the theory that the legislature had failed to comply with the requirement of congress. The relator herein seeks to sustain the veto of the governor and to have determined the question as to whether or not the proceedings of the Senate and the House are a nullity.

In the United States Constitution we find:

Art. I, §4. "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but Congress may at any time by law make or alter such regulations except as to places of choosing Senators."

In the Constitution of the State of Minnesota, we find:

Art. IV, §1. "The Legislature shall consist of the Senate and House of Representatives which shall meet biennially at the seat of government of the State."

On August 8, 1911, the congress passed an act for the apportionment for representatives in congress among the several states under the thirteenth census. 37 St. L. 12, Ch. 5 (U. S. Code Title 2, §3). It was therein provided that the congressmen should "be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants." Such provision is not found in the language of the act of June 18, 1929, 46 St. L. 21. It is the contention of the appellant that said provision of the 1911 law is still in force because the act of 1929 provides that such redistricting should be made.

"By apportioning the then existing number of Representatives among the several States according to the respective number of the several States as ascertained under such census by the method used in the last preceding apportionment."

It is claimed that the foregoing language reads into the statute of 1929 that portion of paragraph 3 of the 1911 statute which requires that the districts be composed of [fol. 42] contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. It is also pointed out that the language of the 1911 act provides that representatives to the sixty-third congress "and each subsequent congress" should be elected from such districts.

The principal questions presented by appellant are, first, that H. F. No. 1456 is invalid because vetoed by the governor and not passed over his veto; secondly, that if H. F. No. 1456 is otherwise valid, the provisions of the same dividing the state into districts are so arbitrary and unfair as to violate the provisions of the act of the congress of August 8, 1911, and also certain provision of the federal constitution.

1. For a long time congress passed apportionment acts following each decennial census act. Obviously these decennial statutes were enacted to meet the change in population and it was always apparently contemplated that ten years hence another law of similar character would be enacted. In 1920 the congress did not enact such a law. Consequently the 1911 statute served. It was a general and permanent law at least for a time and congress very properly caused the same to be included in the judicial code in 1926. Section 3 of the act of 1911 is as follows:

"That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative (37 Stat. L. 14)."

We construe the foregoing section as meaning that the provisions thereof were applicable only to elections held under "this apportionment" i. e., pursuant to the act of 1911. The law was apparently so written to so limit its application. The history of the enactment of these laws, necessitated by the national decennial census, confirms this

belief. No such law having been passed by congress in 1920, the congress in 1929 apparently to meet the past omission and to avoid a repetition enacted the 1929 law [fol. 43] which called for the fifteenth and subsequent decennial censuses and to provide for apportionment of representations in congress. It embraced the two subjects which had usually been covered by separate acts. Upon the enactment of the 1929 law the 1911 act so limited by its own language and so replaced by subsequent law "was no longer upon the scene". The later law contained a clause repealing all inconsistent laws. Some portions of the 1929 law were inconsistent with the same sections in the 1911 law. In fact the 1929 law made provision which would replace all of the 1911 law unless it was that portion of § 3 requiring the districts to have the characteristics therein mentioned. It is true that many statutory laws are cumulative and additional, but such statutes usually involve remedies whereby a class of persons may proceed under a prior law or under the one which gives cumulative or additional remedies. In the case before us the history, nature, purpose and language of these statutes disclose a clear intention on the part of congress to have each of these apportionment acts replace its immediate predecessor. We believe it was the intention of congress to have the 1929 statute supersede and take the place of the entire statute of 1911. Until the 1911 act it was made the duty of the legislatures of the several states to divide the respective states into districts. Such was their constitutional duty. The 1911 act went further and provided that the state legislatures in redistricting should act in the manner provided by the state laws. This was to reach and include the referendum, existing in some states; particularly in the state of Ohio. The clause "by the method used in the last preceding apportionment" as used in the 1929 act we construe as relating exclusively to the arithmetical method of computation.

Congress has never attempted to modify the grant of this constitutional power to the state legislature, but it did assume in the act of 1911 to direct how the duty should be performed, that is, in accordance with the laws of the state. Since no direction now exists we need not consider the power of congress to give this direction in the 1911 law.

[fol. 44] The constitutionality of that act may present a debatable question, but that is unimportant since we hold that that law is no longer in the picture.

2. The act of 1929 does not require the districts to be "composed of a contiguous and compact territory and containing as nearly as possible an equal number of inhabitants."

We are of the opinion that the various provisions of our state constitution cited in the briefs are of little importance in relation to the matter now in controversy. The power of the state legislature to prescribe congressional districts rests exclusively and solely in the language of § 4, Art. I, of the United States Constitution. The provisions of the state constitution control and operate when the ordinary affairs of the state are involved. They cannot of course prevail as against the provisions of the superior fundamental law of our nation.

The legislature is required to "prescribe" the times, places and manner of holding elections. This means "to lay down authoritatively as a guide, direction, or rule of action; to impose as a peremptory order; to dictate; appoint; direct." (Webster's New International Dictionary.)

The command to the legislature comes, as indicated, from the United States Constitution. The reason why the state legislature acts in the matter is because of a mandate not from the people of the state, but from the people of the United States. It seems then that our first question is to be solved by ascertaining the meaning of the term "legislature" as found in the federal constitution, Art. I, § 4.

The ordinary meaning of the word "legislature" is that it refers to the Senate and House of Representatives which our state constitution says constitutes the "legislature". Within this meaning it indicates the representative body, which makes the laws of the state, and of which the chief [fol. 45] executive is not a part, although he has a limited restraint upon the enactment of state laws. Perhaps the veto power is a legislative power. Gottstein v. Lister, 153 P. 595; Spokane Grain & Fuel Co. v. Lyttaker, 109 P. 316; In re Opinion of the Justices, 107 Atl. 705, 5 A. L. R. 1407. The word "legislature" has also been used to indicate "the lawmaking power of the state." In re: Schrader v. Polley, 26 S. D. 5, 127 N. W. 848; Hawke v. Smith, 100 Ohio State 385, 125 N. W. 400; State v. Howell, 107 Wash.

167; Stuart v. Chapman, 104 Me. 17, 70 Atl. 1069; Davis v. Hildebrant, 241 U. S. 565. Appellant urges us to so hold. Under our state constitution the legislature consists of the senate and the house of representatives. We believe the word is ordinarily so understood. The frequent expression that our state, like the nation, has three branches of government, executive, legislative, and judicial, is seldom, if ever, understood as meaning that the governor is a part of the legislative.

In what sense was the word used in the federal constitution? Unless a contrary intent appears we must accept words as used in their ordinary meaning; if so, little construction is here required.

The word "legislature" is found in other portions of the federal constitution. The members in the lower branch of the congress shall have the qualifications requisite to be members of the lower house of the "state legislature." Article I, § 2. Also see amendment XVII. Prior to the adoption of the seventeenth amendment providing for the election of United States senators by popular vote, they were chosen by the "legislature." Art. 1, § 3. The seventeenth amendment also authorized the "legislature" to empower the executive authority to make temporary appointments to fill vacancies in the United States senate until the people fill such vacancies as the "legislature" may direct. Prior thereto the governor was authorized to fill such vacancies by temporary appointments until the next meeting of the "legislature." Art. I, § 3. It is provided that the United States shall protect each state against do- [fol. 46] mestic violence upon application of the "legislature." Art. IV, § 4. It provides that members of the "state legislature" shall take a certain official oath. Art. VI. The phrase "members of the legislature" is used in amendment XIV, § 2, and also in § 3. It provides for the "consent of the legislature" to the United States government buying lands for certain purposes. Art. I, § 8. It prohibits two or more states merging without the "consent of the legislatures of the states concerned". Art. IV, § 3. It provides that amendments may be ratified by the "state legislatures". Art. V. The same article provides that congress upon application of the "legislatures of two-thirds of the several states shall call a convention for proposing amendments." It is provided that the presidential

electors shall be appointed as the "legislature" may direct. Art. II, § 1. Then we have the provision now under consideration.

In the days when the "legislature" elected the United States senators, it was never suggested, so far as we are advised, that the governor could apply his veto power. Indeed in all the use of the word "legislature" in these various provisions in the federal constitution, it would seem that it was used in the same sense—in the ordinary meaning, i. e. as being the representative body which makes the state laws and not all the governmental machinery which constitutes the lawmaking power of the state. Indeed at the time of the adoption of the federal constitution there were seven or more states wherein the veto power did not exist.

We think it was the spirit of the framers of the Constitution that in ordinary questions of governmental affairs, the majority should rule. We see no reason why they would intend to advance the proposition that if the governor was opposed to the judgment of the legislature, that it would have to determine questions referred to it by a two-thirds vote, as is required by our state constitution, instead of by a majority vote, while in those states where no veto existed a majority would always control. We can not think that such consequential situation was intended. We must view the situation from the viewpoint [fol. 47] of the framers of the Constitution as it then appeared in their light. We cannot be controlled by what one might think the law ought to be now. The construction of such constitutional provisions sounds in fundamentals. The word "legislatures" as so used necessarily had reference to legislatures as they were then known. A constitution must always be construed in the light of its history. The referendum was then unknown, and where it has been considered as a part of the lawmaking power relative to Art. I, § 4 it was because of the act of 1911 providing that the redistricting was to be done according to the laws of the respective states. Congress itself, by that act recognized the referendum as a part of the legislative authority of the state.

It is now the settled law that the state legislature in ratifying amendments to the federal constitution, does not act in the discharge of its legislative duties as the law-

making body but does act for and in behalf of and as representative of the people of the state, under the power conferred by Art. V of the federal constitution. Hawke v. Smith, 253 U. S. 221; Barlotti v. Lyons, 182 Cal. 575; Decher v. Secretary of State, 209 Mich. 565; Whittemo- v. Terral, 140 Ark. 493; Prior v. Noland, 68 Colo. 263.

The legislature in districting the state is not, strictly in the discharge of legislative duties as a lawmaking body, acting in its sovereign capacity—but is acting as representatives of the people of the state under the — granted by said Art. I, §—. It merely gives expression as to district lines in aid of the election of certain federal officials; prescribing one of the essential details serving primarily the federal government and secondly the people of the state. The legislature is designated as a mere agency to discharge the particular duty. The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs.

The word "legislature" has reference to the well recognized branch of the state government—created by the state as one of its three branches for a specific purpose—and [fo. 48] when the framers of the federal constitution employed this term we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof. We would not be justified in construing the term as being used in its enlarged sense as meaning the state or as meaning the lawmaking power of the state. We are of the opinion that the authorities support our conclusion. Hawke v. Smith, 253 U. S. 221; Brooks v. Fischer, 79 Cal. 173, 4 L. R. A. 429; Barlotti v. Lyons, 182 Cal. 575; Decher v. Secretary of State, 209 Mich. 565; Whittemore v. Terral, 140 Ark. 493; Prior v. Noland, 68 Colo. 263; In re Opinion of the Justices, 118 Me. 544; State v. Morris, 79 Okla 89; Carson v. Sullivan, 223 S. W. 571; Ex Parte Dillon, 262 Fed. 563; In re Opinion of the Justices, 254 Mass. 617. It follows that the governor's veto herein was a nullity.

State ex rel. Schrader v. Polley, 26 S. D. 5 is not in harmony with our conclusion. The opinion in that case was put upon two grounds, the first being based upon the theory that Art. I, § 4, did not delegate power to the legis-

lature or to the state to provide for the election of representatives, and it was said that this power was one reserved by necessary implication to the various states and that the whole purpose of Art. I, § 4 was simply to grant to the congress the power to supersede by law enacted by congress any state regulation on the subject. The second ground was, however, that the words "the legislature thereof" did not mean simply the representative body we have spoken of, but did mean the "lawmaking power" of the state as established by the state constitution, and including the peope of the state when authorized to act in view of the referendum provisions contained in the state constitution. The second ground in the Schrader case seems to have been overruled by Hawke v. Smith, 253 U. S. 221. We are not satisfied with the first reason given in support of the Schrader case and we speak with the utmost [fol. 49] respect for the learned judges who have reached a conclusion differing from ours. We feel that it was erroneous to claim that the action was taken under a power reserved to the people of the state without regard to the grant of power in the federal constitution. We think the state acts rather under a power surrendered to it. Certainly, congress must have the implied, if not the expressed, power to provide for the election of its members and to make all necessary laws in reference thereto. U. S. Const. Art. I, § 8. We have not considered the matters involved herein in as great detail as were covered by the helpful memorandum of the learned trial court and in reference to the reasoning of the South Dakota case we now quote with approval a portion of the memorandum:

"There can be no inherent power in the people of South Dakota to legislate for any one except themselves. There can be no inherent power in the people of the State to adopt a Federal Constitution or to amend the Federal Constitution which is to govern the inhabitants of other states and territories. As a matter of fact, that Constitution may be amended and they may be subjected to the effects of such amendment without their consent and contrary to their expressed wishes. The Representatives in Congress are officers of the Federal Government. They legislate for all the people of the United States. They govern the District of Columbia, the Territory of Alaska and the island possessions of the nation. It does not sound plausible that

any State may claim that it has inherent power or control over legislative, executive or judicial officers who are performing exclusively federal functions. The State does not have inherent power to determine who shall vote in a federal election, whether it be for President, Senators or Representatives. The right to vote in such an election is derived from the Federal Constitution exclusively. The Federal Government determines the term of office, the duties, powers and rights and the compensation of Senators and Representatives. It determines their apportionment to the several States. It is a Federal election to choose Federal Officers by Federal Electors, Ex. p. Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Felix v. U. S. 186 Fed. 685. Congress has already fixed the time for Congressional elections. U. S. C. A. Title 2, § 7. Nothing is left to the States except through their Legislatures to fix the places of election. As in the case now before the Court, so in the Schrader case, this was done by districting the State. It does not seem to be either an inherent and reserved power of the people of the State nor does it appear to be State legislation subject to the State Constitution."

In ex rel. Davis v. Hildebrant, 241 U. S. 565, it was held that the act of 1911 expressly modified the phraseology of previous acts by inserting a clause mainly intended to pro- [fol. 50] vide that where, by the state constitution and laws, the referendum was treated as a part of the legislative power, the powers thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. The provision so inserted permitting the redistricting to be done by the state "in the manner provided by the laws thereof" permit a referendum under the laws of Ohio and substantially recognizes the referendum as a part of the legislature of that state. No such provision is contained in the present act. The Hildebrandt case seems to hold that Congress has the constitutional power to control the method by which the state legislature may act, and may or may not subject its action to the referendum. If that be the true interpretation of that case, the congress has now deliberately omitted any such requirement and reverted to the character of legislation in vogue prior to 1911 when no control over legislative method was attempted to be exercised. The Hildebrant case is discussed in Hawke v. Smith 253 U. S. 221.

3. The fact that the legislature voted upon the subject matter in the form of a bill is not controlling. Form does not control. We look to the substance. They voted upon the particular measure. No one misunderstood. The issue was clear. They definitely gave their assent to and expressed their determination fixing definite lines, accomplishing the redistricting as they saw fit. They prescribed the districts within the meaning of said Art. I, § 4. In short they did what the constitution said they should do. Their action was effectual.

4. Appellant calls our attention to the fact that on seven occasions prior to voting upon the measure now under consideration the legislature of this state has made state and federal reapportionments in the form of a bill for an act which was approved by the governor. We are of the opinion that such procedure as disclosed in appellant's brief is insufficient to support the claim of practical construction. We are also of the opinion that since the matter [fol. 51] here involved arises out of the federal constitution and its meaning is so clear and the purpose is so apparent, the language being used in its ordinary meaning, that there is no room for the application of the doctrine of practical construction. State ex rel. University of Minnesota, v. Chase, 175 Minn. 259; State ex rel. Morris v. Wrightson, 22 L. R. A. 548.

5. Dividing the territory into districts under Art. I, § 4, involved discretion, a discretion the extent of which cannot be well defined; a discretion on the part of the legislature, not on our part. If the provisions of the 1911 act were still in force, as contended, and serving as a command as to how the duty should be performed, we would be required to hold that the court could interfere only where such discretion is plainly and grossly abused. It is our function to review questions of law and not to revise official action involving the exercise of discretion. We are not to say whether the division is the best that could have been made, but whether the legislature proceeded acording to legal rules. The legislature in this matter was exercising a political and discretionary power granted by the federal constitution for which the members are amenable to their constituents. How nearly equal in population such districts may be made in actual practice must depend largely upon the integrity of the legislature; and we find nothing in the record author-

izing our interference even upon the hypothesis that the rule of conduct, as contained in the act of 1911, still prevails. State ex rel. Meighan v. Weatherill, 125 Minn. 336; Donovan v. Suffolk County, 225 Mass. 55, 2 A. L. R. 1334; People ex rel. Carter v. Rice, 135 N. Y. 473; People ex rel. Woodyatt v. Thompson, 153 Ill. 451; In re Baird, 142 N. Y. 523; State ex rel. Warson v. Howell, 92 Wash. 540; Wise v. Bigger, 79 Va. 269, 2 A. L. R. 1337 Anno. Though a case might arise that would require our disapproval this does not seem to be such.

[fol. 52] 6. However, as already stated, we hold that the act of 1929 wholly replaces the act of 1911, and that the authority so given by Art. I, § 4, is unrestricted, unlimited and absolute. That is, the authority is not hampered by requiring the duty to be performed in any particular manner. The law does not prescribe any rule of conduct controlling the performance of the duty imposed. Under such circumstances in administrative and political affairs and in the absence of constitutional limitations, the action of the legislature is beyond the reach of the judiciary. We have no right to and hope to refrain from putting up our opinion against the opinion of those in whom the exclusive right to redistrict has been lodged. Under the circumstances we simply have no control over the legislature. Richardson v. McChesney, 128 Ky. 363, 129 A. L. R. 299; State ex rel. Morris v. Wrightson, 22 L. R. A. 548, 2 A. L. R. 1337 Anno.

7. It is claimed that H. F. 1456 is so unfair and the districts are so unequal in population, that the redistricting is in violation of the fourteenth amendment to the federal constitution. A part of the argument is that two voters in the same district have the same power as three voters in another of the districts. The specific claim seems to be that the alleged violation of this amendment relates to the provision that "no state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States." It seems sufficient to say that while the constitution does not define the "privileges and immunities" of citizens, the right of suffrage is not one of them. Nor did the fourteenth amendment add to the "privileges and immunities" of a citizen. Minor v. Happersett, 21 Wal. 171; Pope v. Williams, 193 U. S. 632. We believe the argument advanced is fallacious and untenable,

and are of the opinion that the fourteenth amendment is in no way violated.

Affirmed.

[fol. 53] DIBELL, J., dissenting:

My view is that the apportionment of the state into congressional districts must be by legislation. Nor am I satisfied that if it is otherwise H. F. No. 1456, passed by the House and Senate and returned to the House by the governor as a vetoed bill and by its resolution ordered deposited with the secretary of state, without other action thereon, and without action by the senate, constituted an effective apportionment.

STONE, J., dissenting:

I cannot agree that, because in assigning administrative or political functions to state legislatures the constitution excludes all other state agencies, the same conclusion is forced where, as in Art. I, § 4, a specific law-making task is vested in them. Judgment based only upon identification of the agency selected ignores the more important factor of the kind of action demanded. Administrative and political action proceed in their own way and subject to their own peculiar limitations. Legislative action—law making—is something very different, especially in a republic.

The necessity of submitting the result to executive approval or veto, and the right to pass over a veto (although not found in all states) have from the beginning been characteristic of American constitutional government. Few other subjects gave the Constitutional Convention so much difficulty. Its members considered that the power of any legislature to make laws might wisely be subjected to a qualified executive veto. They so conditioned the law-making power of Congress. It could well have been contemplated, therefore, that while any other kind of action would be by the legislature alone, the purely legislative [fol. 54] function of law making would be subject to conditions imposed by the state constitutions.

Wanted in every such case is state action. McPherson v. Blacker, 146 U. S. 2, 36 L. Ed. 869. The legislatures but speak for the states. The manner of their speaking naturally is that best suited or ordinarily resorted to for disposing of the matter in hand. If the latter requires law

making, then law making of the ordinary kind and in the ordinary way must be contemplated.

That the Convention was consciously dealing with a law-making function in Art. I, § 4, is clear. The idea is suggested in the word "prescribed". It is confirmed by the grant to Congress of the power "by law" to make or alter regulations made by the states. "The times, places and manner of holding elections" are not only appropriate to be dealt with by law making but also wholly inappropriate to any other process. So I cannot conceive that the intention was any other than that the task assigned should be performed by ordinary state legislation. Any restriction of state power to subject the law making of its own legislature to executive veto must rest on remote and unnecessary implication and so there is no such restriction.

Because under American theory the people themselves are the source of all governmental powers and the federal constitution but a grant of some, there is merit in the reasoning of the judges in State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848. We never think of any reserved power of the states as one granted by the federal constitution to the new government and as immediately regranted by the same instrument to the states. But without bothering over mere language, the power now in question was plainly vested and confirmed in the state legislatures, however constituted. So far, the provision was satisfactory to the states at the time. But, Judge Story tell- us, the whole section "was afterwards assailed by the opponents of the Constitution, both in and out of the State conventions, with uncommon zeal and virulence. The objection was not to [fol. 55] that part of the clause which vests in the State legislatures the power of prescribing the times, places and manner of holding elections; for so far it was a surrender of power to the State governments. But it was to the superintending power of Congress to make or alter such regulations." Story on the Constitution (4th Ed.) § 814. There is no difference of substance between the South Dakota view that the power was "reserved" by the state governments and that of Judge Story that it was surrendered to them. They agree that the power remained in the "state governments." Had the state conventions, or any single member of any of them considered any other view tenable, the debates would show it. The "uncommon zeal and virulence" of the opponents of adoption were such

that not even slight and technical objections to the new national government were overlooked. This one, if any one had thought of it at all, would have been made much of, for the whole fight on the Constitution was grounded on its effect as a surrender of state power.

McPherson v. Blacker, supra, is helpful only by contrast. The power there involved, of the state legislatures in the selection of presidential electors, was not legislative but political in character. Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. Ed. 1173, seems to me decisive of the main question. The power of Congress principally discussed was that to decide what is republican government within the constitutional guaranty thereof to the state. It is to that alone that Mr. Chief Justice White directed most of his reasoning dealing with the powers of Congress. It was considered plain, assuming the power had been invoked, that Congress had recognized, in the Act of 1911, that the referendum did not introduce any such "virus" as to make the Ohio state government other than republican. It was not held that Congress had any power whatsoever to make or unmake the referendum as a part of the state legislatures as meant by Art. I, § 4. On the contrary, the states are repeatedly referred to, in respect to their functions under that section, as acting "through their legislative au-
[fol. 56] thority" or as exercising "state legislative power for the purpose of creating Congressional districts by law." That is, "legislature" as used in Art. I, § 4, was considered synonymous with "the legislative power" of the states. Hence, it was concluded, the involved redistricting act was properly subject to veto by referendum under the Ohio constitution.

That conclusion is impossible unless Art. I, §4, invokes the whole legislative power of the states.

In that assertion I do not overlook the discussion by the court of the Act of Congress of 1911 and its effect, "in so far as Congress had power to do" it, of recognizing the validity of a referendum on a state redistricting act. The limitation, "in so far as Congress had power to do", is significant. Whatever power is possessed by the states or their legislatures has been the same ever since the constitution was adopted. The exercise of that power is subject to supervision (ex parte Siebold, 100 U. S. 371, 25 L. ed. 71) but the grant of it not to modification, by Congress. That

body can no more modify or impose new conditions on the constitutional confirmation of state power than it can amend the grant of its own. So it cannot say how or by whom the state power shall or may be exercised. It cannot say of what a state legislature may or may not consist for the purpose of its exercise.

Congress may "by law" make its own "regulations" or alter those of the states. It cannot say either that the state regulation shall or shall not be subject to veto by executive or people. That would be to amend the constitutional confirmation of power in the state legislatures which has always meant either that their power was or was not subject to such veto. The Act of Congress of 1911, while it could not change the Constitution, could and did construe it. The interpretation was that the whole legislative power of the state was invoked, the referendum to be or not to be a part of it as determined by the fundamental law of each state.

If, as we now decide, the term "legislatures," as used [fol. 57] in Art. I, §4, does not refer to the legislative power of the state, however exercised, but is confined to the members of the legislatures as such, and so excludes executive veto, it equally excludes veto by referendum, and both the opinion of Congress and the decision in the Hildebrant case are wrong.

That case was distinguished in Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871. An Ohio referendum was again in question. It was held without effect on the ratification by the legislature of an amendment to the federal constitution. The argument that to require approval by referendum was simply one for ratification by the legislative action of the state was considered "fallacious in this—ratification by the state of the constitutional amendment is not an act of the legislature in the proper sense of the word. It is but the expression of the assent of the state to the proposed amendment."

The Hildebrant case was considered "inapposite" because, first, as said there, "Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated." (As already shown, Congress could not make or unmake the referendum as part of the legislative power of the state for that or any other purpose. The most it could do was to recognize, as it did

by the act of 1911, that it was part of the legislative process in some states.) The court went on to say, next:

'It was held, (In the Hildebrant case) * * * that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. Art. I, §4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.''

We are dealing now with legislative action. It is established that, if required by a state constitution, the referendum is a part of the legislative process. It must be equally [fol. 58] true that, when made so by a state constitution, executive approval and veto are parts of the same process and so not excluded by Art. I, §4.

I cannot concur either in putting aside so easily the argument that there has been a persuasive, if not a controlling, practical construction contrary to the conclusion of the majority. It is always easy for a court to remove a case from the reach of any sort of construction simply by asserting a lack of room for it. The contrary opinion of the court of last resort of our sister state of South Dakota is enough to make a real question. The comment already cited from Judge Story shows that the state ratifying conventions considered that the power concerning times, places and manner of electing congressmen, was left to unframmelled state action, except for the superintending function of Congress. The latter was all they objected to.

Without adequate historical search, my impression is that never heretofore has there been serious question that the state have the whole power of legislative action in the matter, except as Congress may make its own regulations or alter those of the states. Minnesota is but one of many states, (all of them so far as I know) where congressional redistricting has been always by ordinary statute. The present Chief Justice of the United States, when governor of New York, expressed himself on the subject of congres-

sional redistricting to an extraordinary session of the legislature in 1907 as follows:

"It is not my purpose to propose a particular plan of apportionment. It is the function of the legislature to formulate such plan and submit it by suitable bill for executive action." Public Papers, New York, July 8, 1907, p. 52.

Congress has always assumed that congressional redistricting could be by ordinary state legislation, participated in by the executive through the right of veto where required by fundamental state law. That it has considered also that such legislation may be subject by state law to veto by referendum is plain from the Act of 1911 and the debates concerning it. 47 Cong. Record, 3436, 3437, 3507.

[fol. 59] One thing more. Our legislature thought that it was proceeding in the ordinary way, by "A Bill for an Act" which, before becoming effective as law, would need approval by the governor, unless passed over his veto. As such and not otherwise it was submitted to him. Only the lower house, after his veto and in default of repassage, ordered the measure filed with the secretary of state. It strikes me that we ought not so far to disregard the intention of our own legislature as to say that its purpose was other or different from what so plainly appears, that is to enact state law in the ordinary fashion but first to subject it to executive disapproval. So possibly we do not have before us the question that would arise had the legislature intentionally proceeded independently of the governor. The scope of their action they themselves define so plainly as to negative that intention. They attempted only to enact a state law. I question whether we can exempt it from any of the applicable provisions of our state constitution.

As to the substance of the measure, I agree that we cannot hold it a transgression of legislative power. I agree also that the act of Congress of 1911 is wholly superseded by the one of 1929.

For the reasons above given, I think that the order appealed from should be reversed.

[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1711)

FILE COPY

FILED
FEB 23 19
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1931

No. 617

W. YALE SMILEY, *Petitioner,*

vs.

MIKE HOLM as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

JOINT MOTION OF BOTH PARTIES TO ADVANCE CASE FOR ARGUMENT

GEORGE T. SIMPSON,
Counsel for Petitioner
HENRY N. BENSON,
Attorney General of Minnesota,
Counsel for Respondent.

LAWYERS BRIEF CO., 410 COURT BLOCK, ST. PAUL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1931

No. 617

W. YALE SMILEY, *Petitioner,*

vs.

MIKE HOLM as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

JOINT MOTION OF BOTH PARTIES TO ADVANCE CASE FOR ARGUMENT

Come now the petitioner and respondent in the above entitled action, through their respective counsel, and jointly move that this case be advanced for early hearing, if possible on some date not later than March 31st, 1932; and, in support of said motion, make the following brief statement of the matter involved and the reasons relied upon for advancement:

This court has granted petitioner's motion for a writ of certiorari to review the judgment of the Supreme Court of Minnesota holding, in effect, that the action of the State Legislature of Minnesota with regard to House File 1456, notwithstanding its veto by the Governor, is effective to divide the State of Minnesota into nine congressional districts. Under the laws of Minnesota, a primary election for nominating candidates for Congress will be held on the third Monday in June, to-wit, June 20, 1932 (Mason's Minnesota Statutes 1927, section 293). Can-

didates for nomination must file at least forty days before the primary election, to-wit, not later than May 11, 1932 (Mason's Statutes, section 297). The general election will be held on November 8, 1932 (Mason's Statutes, section 255).

The Legislature of the State of Minnesota is not now in session, and the next regular session is in January, 1933 (Mason's Statutes, section 24). Until such time as this court shall have announced its decision, the electors of the State of Minnesota will be, and they are now, uncertain as to whether candidates for nomination and election to the Congress of the United States will be elected by districts as delineated in House File 1456, or otherwise. The same uncertainty will exist among prospective candidates for congressional office. Until this court announces its decision candidates for nomination to the House of Representatives in Congress will not be advised whether to file as candidates in the districts so fixed by House File 1456 or otherwise, and as a result great confusion and uncertainty will arise, and it may be that filings according to congressional districts will be invalid and that the entire purpose of holding the primay next June will be defeated so far as nominations for representatives in Congress are concerned.

The petitioner herein now intends to rest upon his brief filed in support of his petition for a writ of certiorari, except for certain citations of additional authorities, and the respondent will undertake to prepare and file his brief at such date as may be fixed by this court, upon two weeks' notice, and serve a copy thereof upon the petitioner not less than one week from the date set by the court for hearing.

The issues involved herein are not only important to

the State of Minnesota, but also to the States of Missouri, New York and Illinois, respectively, where substantially the same questions as involved herein have been passed upon by the respective courts of last resort.

WHEREFORE, both the petitioner and the respondent pray that this case be advanced upon the calendar and assigned for hearing at an early date, as above specified.

Dated—Febuary 17, 1932.

GEORGE T. SIMPSON,
Counsel for Petitioner

HENRY N. BENSON,
Attorney General of Minnesota,
Counsel for Respondent.

FILE COPY

FILED
JAN 5
CHARLES ...

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 617

W. YALE SMILEY,
Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF MINNESOTA

AND

BRIEF IN SUPPORT THEREOF

GEORGE T. SIMPSON,
Counsel for Petitioner,
730 Security Building,
Minneapolis, Minnesota.

JOHN A. WEEKS,
736 Andrus Building,
ALFRED W. BOWEN,
1360 Rand Tower,
F. J. DONAHUE,
414 Hodgson Building,
W. YALE SMILEY, pro se,
910 McKnight Building,
Minneapolis, Minnesota,
Of Counsel.

SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1
Summary Satement of Matter Involved	1
Reasons Relied on for the Allowance of the Writ	4
Prayer for Writ	5
Brief in Support of Petition for Writ of Certiorari	7
I. The Opinion of the Courts Below	7
II. Jurisdiction	7
III. Statement of the Case	9
IV. Specifications of Error	10
V. Argument	10
Summary of Argument	10
Point A—House File 1456 Is Not the Action of the "Legislature"	12
Point B—House File 1456 Is Invalid Because It Does Not Comply with Existing Federal Constitutional Provisions and Statutory Regulations	23
Point C—House File 1456 Is Invalid Because It Is Unequal and Discriminatory	29
Point D—The Courts Have Power to Grant Relief	33
Conclusion	38
Appendix	
E—United States Constitution, Art. I, Sec. 4	39
F—United States Constitution—Amendment XIV	39
G—Table of Congressional Statutes on Apportionment	41
H—The Act of August 18, 1911 (37 St. L. 13)	42
I—Act of June 30, 1926 (44 St. L. 773)	44
J—Act of June 18, 1929 (46 St. L. 26)	46
K—Congressional Record, Excerpts from	48
L—Minnesota Constitution—Art. IV, Sec. 23	57
Art. IV, Sec. 2	57
M—The Legislative Power of the State of Minnesota	58
Organic Act of Minnesota, Sections 4, 6, 20	58
Minnesota Constitution—Art. IV, Sec. 11, 12	59
The Act Authorizing the State Government (1857)	60
The Act of Admission (1858)	60
N—State Legislative Districts	60
Organic Act of Minnesota (1849), Sec. 4	60
Act Authorizing State Government (1857), Sec. 3	61
Minnesota Constitution, Art. IV, Sections 23, 24	61
O—Congressional Districts	61
Organic Act (1849), Sec. 14	61
Act of Admission (1858), Sec. 2	62
P—Chapter 105, Laws of Minnesota 1931	62
Q—Table of Minnesota Districting Acts	63
R—Table of State Redistricting Method	63
S—Moran v. Bowley (Circuit Court Illinois, 1931)	65
T—Koenig v. Flynn (Sup. Ct. N. Y., 1931)	74

TABLE OF CASES CITED.

Beidler v. So. Car. Tax Comm'n (1930), 282 U. S. 1, 51 Sup. Ct. 54, 75 L. Ed. 69 37
Blodgett v. Silbermann (1928), 277 U. S. 1, 48 Sup. Ct. 410, 72 L. Ed. 749 38
Brooks v. State (1904), 162 Ind. 568, 70 N. E. 980 36
California v. Deseret Water Co. (1917), 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821 38
Carter v. Texas (1900), 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839. 37
City of Carlyle v. Nicolay (1929), 333 Ill. 562, 165 N. E. 211 19
Civil Rights Cases (1883), 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 836. 30
Cumberland Coal Co. v. Board of Revision (1931), — U. S. —, 52 Sup. Ct. 48, 76 L. Ed. 131 9
Dowling, In Re (1916), 219 N. Y. 44, 113 N. E. 545 31
Doyle v. Hoffstadter, In Re (1931), 257 N. Y. 244, 177 N. E. 489.... 17
Fitzgerald v. Voorhis (1918), 222 N. Y. 494, 119 N. E. 106 19
Giddings v. Blacker (1892), 93 Mich. 1, 52 N. W. 944 36
Gieger v. First-Troy Nat'l Bank (1929), 30 Fed. (2nd), (C. C. A. 6) 7. 9
Graham v. Goodsell (1931), 282 U. S. 409 (425), 51 Sup. Ct. 186, 75 L. Ed. 415 28
Grossman, Ex Parte (1924), 267 U. S. 87 (119), 45 Sup. Ct. 232, 69 L. Ed. 527 20
Hadden v. Barney (1867), 72 U. S. 107 (113), 18 L. Ed. 518 25
Harriet State Bank v. Samels (1925), 164 Minn. 265 (273), 204 N. W. 938 9
Henderson's Tobacco (1870), 78 U. S. 652, 20 L. Ed. 235 28
Kennedy v. United States (1924), 265 U. S. 344, 44 Sup. Ct. 501, 68 L. Ed. 1045 28
Koenig v. Flynn (1931 Sup. Ct. N. Y.), Appendix T herein 21
La Rocca v. Flynn, In Re (1931), 257 N. Y. 5 (13), 177 N. E. 290.. 21
Maxwell v. Bugbee (1919), 250 U. S. 525 (537, 538), 40 Sup. Ct. 2, 63 L. Ed. 1124 30
McGrain v. Daugherty (1927), 273 U. S. 135 (174), 47 Sup. Ct. 319, 71 L. Ed. 580 20
Mitchell v. Clark (1884), 110 U. S. 633, 4 Sup. Ct. 170, 28 L. Ed. 279. 37
Moran v. Bowley (1931 Circuit Court Illinois), Appendix S herein. 22
Nixon v. Herndon (1927), 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759 8
Pacific States Tel. & Tel. Co. v. Oregon (1912), 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377 12
People v. Baldwin (1930), 341 Ill. 604, 174 N. E. 51 38
People v. Murray (1896), 149 N. Y. 367, 42 N. E. 584 21
People v. Palmer (1895), 12 Misc. 392, 33 N. Y. S. 1088; aff'd in 146 N. Y. 406 (2), 42 N. E. 543 (18) 19
People v. Supervisors (1893), 138 N. Y. 95, 33 N. E. 827 31
People v. Tremain (1929), 252 N. Y. 27, 168 N. E. 817 36
People v. Zimmerman (1928), 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 63 9
Power Co. v. Saunders (1927), 274 U. S. 490 (493, 497), 47 Sup. Ct. 678, 71 L. Ed. 1165 31
Putnam v. Pyle (1930), — S. D. —, 232 N. W. 20 36
Rogers v. Hennepin County (1916), 240 U. S. 184, 36 Sup. Ct. 265, 60 L. Ed. 594 38
Santovincenzo v. Egan (1931), — U. S. —, 52 Sup. Ct. 81, 125 (2), 76 L. Ed. 135 9
Sherrill v. O'Brien (1907), 188 N. Y. 185, 81 N. E. 124 31
Sjoberg v. Security Savings & Loan Ass'n (1898), 73 Minn. 203 (212, 214), 75 N. W. 1116 19
Smiley v. Holm (1931), — Minn. —, 238 N. W. 494, 792 (1), Record Appendix D 7
Spokane Grain & Fuel Co. v. Lyttakee (1910), 59 Wash. 76, 109 Pac. 316 17

Standard Scales Co. v. Farrell (1919), 249 U. S. 571 (577), 39 Sup. Ct. 380, 63 L. Ed. 780 30
State v. Cunningham (1892), 81 Wisc. 440, 51 N. W. 724 36
State v. Cunningham (1892), 83 Wisc. 90, 53 N. W. 35 36
State v. Hildebrandt (1916), 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172 5
State v. Polley (1910), 26 S. D. 5, 127 N. W. 848 ..... 8 62
State v. Smith (1920), 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871 13
State v. Sullivan (1912), 117 Minn. 329, 135 N. W. 748 20
State v. Zimmerman (1925), 187 Wisc. 180, 204 N. W. 803 (812) 19
Stiglitz v. Schardien (1931), — Ky. —, 40 S. D. (2nd) 315 36
Story v. Craig (1921), 231 N. Y. 33 (40), 131 N. E. 560 21
Stuart v. Chapman (1908), 104 M. E. 17, 70 Atl. 1069 17
Stuart v. Laird (1803), 5 U. S. (1 Cranch. 298), 299, 2 L. Ed. 115 20
Swafford v. Templeton (1902), 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005 30
Van Huffel v. Harkelrode (1931), — U. S. —, 52 S. Ct. 115, — L. Ed. — 9

TABLE OF STATUTES CITED.

(In addition to those set out in the Appendix.)

United States Constitution, Art. I, Sec. 7 17
Section 237, Judicial Code (28 U. S. C. A., Sec. 344) 7
Equity Rule No. 29 9
Mason's Minnesota Code 1927, Sec. 9251 9

TEXTBOOKS AND ENCYCLOPEDIAS CITED.

Cooley, Constitutional Limitations, 5 Ed., p. 183 28
Dunnell's Minnesota Digest, Sec. 8952 20
R. C. L., Vol. 25, pp. 918, 920, 922; Secs. 169, 170, 171 28
Story on Const., Vol. I, Sec. 815 13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

NO.....

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The Petition of W. Yale Smiley respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your petitioner, W. Yale Smiley, respectfully states that he is aggrieved by the judgment of the Supreme Court of the State of Minnesota rendered on the 17th day of November, 1931, in a suit, wherein this petitioner sought to have declared invalid all filings for nomination for the office of Representative in Congress designating a subdivision of the State of Minnesota as a congressional district, pursuant to House File 1456, Session Minnesota Legislature for the year 1931 (R., pp. 3-5, ff. 4-6), and to require him to return the fees received therefor; to enjoin the Secretary of State from accepting any more such filings; from giving notice of the holding of an election for the office of Representative in Congress from

such congressional districts; and for such other and further relief as might in the premises be proper.

Your petitioner is a resident, citizen, taxpayer, and elector of and in the Fourth Ward of the City of Minneapolis, County of Hennepin, and State of Minnesota.

The Federal and State Laws applicable are referred to briefly as follows:

Following the 1910 Federal Census Congress passed the Act of August 8, 1911 (Appendix H, p. 43) providing for the apportionment among the several states of four hundred thirty-five members of which Minnesota had ten.

Congress did not pass a reapportionment Act based on the 1920 Census; but anticipated the Census of 1930 in the Act of Congress of June 18, 1929 (Appendix J, p. 46). Pursuant to this Act the President of the United States transmitted to Congress his message and statement showing the returns of the 1930 Census (R., p. 2, f. 2) and thereupon and upon the failure of Congress to act the Clerk of the House of Representatives certified to the Governor of the State of Minnesota the fact that the State of Minnesota, under said Census, was entitled to nine representatives in Congress (R., pp. 2-3, f. 3) instead of ten.

The population of the State of Minnesota under the 1930 Census totalled 2,551,583. An equal division of the State into nine Congressional Districts would allocate 283,509 inhabitants to each Congressional District.

Prior to the attempted enactment of House File 1456, here challenged, the last districting of the State for congressional purposes, was made following the federal Census of 1910 by a Bill for an Act duly approved by the Governor, Chap. 315, Laws of Minnesota 1913. This Act was amended by Chap. 64, Laws of Minnesota 1929.

The Legislature of the State of Minnesota at its 1931

session, by a Bill for an Act which originated in the House of Representatives on April 15, 1931, known as H. F. 1456, undertook to redistrict the State into nine congressional districts. It passed that body and was sent to the Senate. After passage therein without amendment, the Bill was transmitted on the 20th day of April, 1931, to the Governor of the State for his approval. Thereupon the Governor vetoed the Bill and on the same day returned it to the House accompanied by his reasons for such veto (R., pp. 5-6, ff. 6-7).

On April 22, 1931, the House of Representatives, without according the Senate further opportunity to act thereon, alone adopted the resolution set out in paragraph twelve of the petition (R., p. 7, f. 8) and on the same day adjourned *sine die*.

Pursuant to this resolution, House File 1456 was deposited in the office of the Secretary of State on April 27, 1931, and was by him received and filed as valid legislation. Thereafter, he received and accepted the filing fee of a candidate for election as Representative in Congress from one of the congressional districts purported to be established by said House File 1456.

The redistricting attempted in House File 1456 did not provide for an equal, or nearly equal, population in each of the nine districts. There is a difference of 115,904 in population between the largest and smallest districts and marked differences with respect to each and all of the said districts (R., p. 8, f. 9). Nor were the districts composed of contiguous and compact territory. This lack of contiguity and compactness may be seen by reference to the maps contained in Exhibits "A" and "B" (R., pp. 17-20, ff. 19-20).

This petitioner thereafter, and on the 4th day of May,

1931, commenced this action, after having requested the Attorney General of the State to bring it and the Attorney General had declined so to do. The respondent, the Secretary of State, demurred to the complaint (R., p. 12, f. 14), which demurrer was sustained by the trial court (R., p. 13, f. 15). Thereafter an appeal was taken to the Supreme Court of the State of Minnesota which affirmed the trial court (R., p. 13, f. 15). Thereafter the trial court entered judgment of dismissal on the merits (R., p. 14, f. 16), from which judgment this petitioner appealed to the Supreme Court of the State of Minnesota, which affirmed the judgment below and entered judgment on the 17th day of November, 1931 (R., pp. 15-16, ff. 17-18).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Importance of Questions Involved.

The matter of dividing a state into congressional districts is of nation-wide importance. Until 1931 such action has been taken in all states by the ordinary and usual lawmaking procedure, namely, by a bill for an act duly passed by both houses of the legislature and submitted to the governor for his approval. But subsequent to the federal Census of 1930 the question of the manner of such districting was raised for the first time in at least four states, namely, Minnesota, New York, Illinois, and Missouri, and in each state recourse has since been had to the courts with contradictory results. It is, therefore, of the utmost importance, since the exercise of the power to redistrict a state for congressional purposes is controlled by federal law, that the question be authoritatively determined by this Court.

Federal Law Erroneously Construed by State Court.

The Supreme Court of the State of Minnesota in the case at bar has erroneously construed the applicable provisions of the federal Constitution; has erroneously determined their effect; and has erroneously determined the question of the existence, and the effect, of certain applicable federal Statutes.

Conflict of Decisions.

The decision of the Supreme Court of the State of Minnesota, in the case at bar, in sustaining the attempted re-districting of the State under House File 1456, is contrary to and in conflict with the decision of this Court in *State ex rel Davis v. Hildebrandt* (1916), 241 U. S. 656, 36 Sup. Ct. 708, 60 Law Ed. 1172, and other applicable decisions of this Court; and is contrary to the applicable decisions of the courts of other states.

Wherefore, Your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the Supreme Court of the State of Minnesota, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 28825, *The State of Minnesota, upon the Relation of W. Yale Smiley, Petitioner and Appellant, v. Mike Holm, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, Respondent,* and that the judgment of the Supreme Court of the State of Minnesota may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as

to this Honorable Court may seem meet and just, and your petitioner will ever pray.

W. YALE SMILEY,
By GEORGE T. SIMPSON,
Counsel for Petitioner,
730 Security Building,
Minneapolis, Minnesota.

Dated: November 20, 1931.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1931.
NO.....

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

[*Acknowledgment is made of the courtesies extended by the Attorney Generals and other counsel interested in the pending redistricting cases from New York, Illinois and Missouri.*]

I.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Minnesota appears in — Minn. —, 238 N. W. 494, 792 (1), and is set forth verbatim as Appendix "D" (R., p. 44, f. 38) and in the Record at page 16, folio 18.

II.

JURISDICTION.

1. The appellate and supervisory jurisdiction of the Supreme Court of the United States is invoked, under Section 237, Judicial Code of the United States (28 U. S. C. A., Sec. 344), to correct error of the Supreme Court of the State of Minnesota in the case cited in the last preceding paragraph. The petitioner brought suit in the courts of the State of Minnesota to challenge the validity

of the attempted division of the State into congressional districts by the 1931 Legislature, under House File 1456, on the ground that said division violates the federal Constitution and laws; and deprives this petitioner of his political rights. The State Supreme Court sustained the validity of House File 1456.

2. Final judgment of the Supreme Court of the State of Minnesota herein was entered on the 17th day of November, 1931 (238 N. W. 792 (1); R., p. 16, f. 18).

3. The case at bar comes within the appellate jurisdiction of this Court, under Section 237 of the Judicial Code, by reason of the admitted allegations set forth in the Petition, which facts are not here repeated to save space and the time of this Court. The provisions of Art. I, Sec. 4, and of the Fourteenth Amendment of the federal Constitution, and the federal Statutes, relating to the apportionment of Representatives among the several States, were drawn in question, as well as the rights, privileges and immunities under the federal Constitution and laws, of the petitioner and other citizens similarly situated. The judgment of the Supreme Court of the State of Minnesota sustained the validity of House File 1456, and adversely determined the claims of this petitioner based on said constitutional and statutory provisions; and denied the asserted rights, privileges and immunities of this petitioner and other citizens similarly situated.

It is clear that this petitioner as a resident, citizen, taxpayer and elector may maintain this action to enforce and protect his political rights and the right to equality in the enjoyment thereof on the authority of the decision of this Court in—

Nixon v. Herndon (1927), 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759.

That this Court has jurisdiction in the premises on this petition invoking the Court's appellate and supervisory jurisdiction is established by:—

Cumberland v. Board of Revision (1931), — U. S. —, 52 Sup. Ct. 48, 76 L. Ed. 131.

Santovincenzo v. Egan (1931), — U. S. 66, 52 Sup. Ct. 81, 125 (2), 76 L. Ed. 135.

Van Huffel v. Harkelrode (1931), — U. S. —, 52 Sup. Ct. 115, — L. Ed. —.

People of the State of New York v. Zimmerman (1928), 278 U. S. 63, 49 Sup. Ct. 61, 73 L. Ed. 184.

State ex rel Davis v. Hildebrandt (1916), 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172.

III.

STATEMENT OF CASE.

The facts involved in the case at bar are not in dispute. They were expressly admitted by the respondent in his argument and brief below. Moreover, the facts are admitted, deemed true and uncontradicted as a matter of law, because the respondent has not interposed an answer denying the allegations of the petition, but relied below, and now relies, solely on a demurrer.

Equity Rule No. 29.

Gieger v. First-Troy National Bank (1929), 30 Fed. (2nd) (C. C. A. 6) 7.

Mason's Minnesota Statutes 1927, Section 9251.

Harriet State Bank v. Samels (1925), 164 Minn. 265 (273), 204 N. W. 938.

IV.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of the State of Minnesota erred in sustaining the judgment of the trial court and in entering judgment of dismissal.

2. The Supreme Court of the State of Minnesota erred in construing the word "legislature" in Art. I, Sec. 4 of the federal Constitution and Art. IV, Sec. 23 of the Minnesota Constitution, when that court restricted the meaning to the two bodies of the State Legislature exclusive of the executive action of the Governor.

3. The Supreme Court of the State of Minnesota erred in holding that in April of 1931 and since that time there was and now is no federal regulation of the function of dividing a State into Congressional districts.

4. The Supreme Court of the State of Minnesota erred in holding that the rights, privileges and immunities guaranteed to this petitioner, and others similarly situated under the equal protection clause of the Fourteenth Amendment, are not violated by House File 1456.

5. The Supreme Court of the State of Minnesota erred in holding that the courts cannot grant relief in the premises.

V.

ARGUMENT.

Summary of Argument.

The petitioner claims that the attempted division of the State of Minnesota into nine congressional districts by the Minnesota Legislature at the 1931 session thereof, by means of House File 1456, is invalid for any purpose. That his petition in the state courts properly and sufficiently challenged the validity of House File 1456, and

that the final judgment of the State Supreme Court, and its action, in sustaining the judgment of dismissal by the trial court, are erroneous for the following reasons:

A. House File 1456 is not the action of the "Legislature" within the meaning of Art. I, Sec. 4 of the United States Constitution.

B. House File 1456 is invalid because it does not comply with and because it violates existing federal constitutional and statutory provisions, regulating the function and act of, dividing a state into congressional districts.

C. House File 1456 is invalid because it is an unequal and arbitrary division of the state; is subversive of fundamental principles of equality and fairness in the enjoyment of political rights of citizens throughout the state; discriminates between citizens of the various districts; and abridges the rights, privileges and immunities of this petitioner under the equal protection clause of the Fourteenth Amendment.

D. The courts have the power, and in the premises the court below was under the duty, to grant relief.

The Ultimate Questions Presented.

The issues may be summarized in two questions for the determination of this Court:

1. Are the State Legislatures, when dividing the state into congressional districts, required to follow the procedure necessary in making laws?

2. Must the division be reasonably equal as to population, and contiguous and compact as to territory? In other words, is political gerrymandering prohibited?

The petitioner invites the attention of this Court to the fact, which cannot be emphasized too much, that no challenge is here made by the petitioner as to the *form* of government, either by reason of the action of the

State or by action of Congress. Whether House File 1456 is, or tends to be, destructive of republican *form* of government is not raised. We challenge only the unlawful *exercise* of the legislature's powers. We challenge only House File 1456 because it is unauthorized by law, unfair and unequal in result, and because it discriminates between qualified electors in the different districts.

Pacific States Tel. & Tel. Co. v. Oregon (1912), 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377.

Point A.

(Assignment of Errors 1 and 2.)

House File 1456 is not the action of the "Legislature" within the meaning of Article I, Sec. 4, U. S. Constitution.

A short analysis of the function and the act of dividing a state into congressional districts may help to clarify the issues before this Court.

With respect to the method, some of the states have provided for making such division by provision in the state Constitution; some have proceeded by statute only; others have done neither; and some have done both. In Minnesota, both constitutional provisions (Appendix L, p. 57) and Statutes (Appendix Q, p. 63) have been provided.

With respect to the agency, that is, the department of the state government by which the division is to be made, it has uniformly, and without exception, been done by the legislative branch rather than by the executive or judicial departments (Appendix R., p. 63). Indeed it is conceded, below, that the function and act of dividing a state is essentially legislative in character.

As between the federal and state governments, it is submitted that such division is made primarily for the benefit of the state, and its people, rather than in the interest of the federal government. For, where a state is entitled to nine representatives in Congress, it is relatively unimportant to the federal government whether the congressmen are elected at large or from districts. The state legislature, insofar as it is part of the legislative power of the state, may, and does, act in two capacities: First, in the ordinary, usual, *legislative* capacity, that is, the enacting of a bill for an act which will result in a law, when and if approved, by the governor of the state, or, if rejected by him, re-passed over his veto by the majority required under state law; second in the *representative* capacity in which the legislature acts, when it is ratifying an amendment to the federal Constitution; or when, prior to the Seventeenth Amendment to the federal Constitution, it was selecting senators to represent the state in the upper branch of Congress. This distinction has been laid down in the cases of:

State ex rel Davis v. Hildebrandt, supra.

State ex rel Hawke v. Smith (1920), 253 U. S. 221, 4 Sup. Ct. 495, 64 L. Ed. 871.

On the question of the source of the power of a state to divide the state into congressional districts, there is a division of authority. One side proceeds on the theory that the power is an inherent and reserved power (Story on Const., Vol. I, Sec. 815); the other, that the power is derived from the federal government to which it had been surrendered. Inasmuch as the court below, although apparently on the latter side, states that the question need not be determined, because in any event the power is now lodged in the state, subject only to the provisions of the United States Constitution and to regulation by

Congress—with which latter statement we fully agree—we pass the matter without further comment, except to invite the attention of this Court to the discussion of this point in the dissenting opinion below (R., p. 59, f. 55).

On the foregoing basis, it is submitted that the dividing of a state, into congressional districts, is a function and act performed, primarily, for the benefit of the state and its people; that the function and act call for the exercise of the legislative power of the state; and that the power to make such division is lodged in the state, subject, however, to the provisions of the federal Constitution and regulation by Congress. The question of whether, or not, Congress has exercised its powers of regulation, and whether such regulation was in existence at the time of the attempted passage of House File 1456, will be discussed below under Point B.

With this in mind, we may now inquire as to the meaning of the words "prescribed in each state by the legislature thereof" in Art. I, Sec. 4, of the Constitution of the United States. The petitioner insists that the words "prescribed in each State by the legislature thereof" means the law-making power of the states and includes, in Minnesota, the approval or veto of the governor.

The legislature, as one of three coordinate branches of our system of government, is primarily a law-making body. It can, and ordinarily does, express itself only through its action in making laws, although under our dual system of government, the state legislatures, for certain purposes, have a representative character. The legislature, in dividing a state into congressional districts, is called upon to exercise, and can exercise only, its ordinary and usual legislative, or law-making powers, and in no sense can be said to be acting in its representa-

tive capacity. We submit that this construction was determined by this Court in the case of *State ex rel Davis v. Hildebrandt, supra,* and that this case is decisive of that question. See also *State ex rel Hawke v. Smith, supra.* Therefore, it was idle for the respondent, and for the court below, to accumulate references to the meaning of the word "legislature" as used in the various sections of the federal Constitution, for the purpose of showing that the legislature can act only in a legislative capacity, and it is idle to argue that because of the evident meaning of "legislature" in such other constitutional provisions, inapplicable here, however, the term "legislature" as used in Art. I, Sec. 4, is to be limited to the two houses of the state legislature and excludes action by the governor. We submit that the majority of our state Supreme Court failed to appreciate the significance of the distinction between the legislative and representative functions of the legislature; and hence reached an erroneous conclusion as to the meaning of the word "legislature." This was the precise point upon which the two dissenting justices disagreed with the majority. Finally, the judicial construction by state courts, with the exception of the Supreme Court of the State of Minnesota, in the case at bar, is also in accord in holding that the term "legislature" in Art. I, Sec. 4, means the legislative, or law-making power of the state; and includes the veto power of the governor, or the veto power of the people, the referendum, if so provided by state law.

Thus it appears that the legislature's power is only part of the power to enact laws; and that enacting laws is not the exclusive attribute of the state legislature (Appendix M, p. 58). Its enactments or resolutions have no force as laws generally, and in Minnesota in particular,

unless and until submitted to and approved by the governor; or, if vetoed by him, repassed over his veto by the majority necessary under the state constitution. As one eminent jurist has said:

"In the State of New York that [law-making] department is not the Legislature alone, but the Legislature and the Governor, the one as much as the other an essential factor in the process. *People v. Bowen*, 21 N. Y. 517, 519, 521; *Matter of City of Long Beach v. Public Service Commission*, 249 N. Y. 480, 489, 490; 164 N. E. 553. We beg the question when we argue that the Legislature may give immunity because the Legislature is the sole custodian of the legislative power. It is not the sole custodian of that power. The power is divided between the Legislature and the Governor. *Cf. Ohio ex rel Davis v. Hildebrandt*, 241 U. S. 565, 36 Sup. Ct. 708, 60 L. Ed. 1172; *Hawke v. Smith*, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. Ed. 871, 10 A. L. R. 1504. * * * The Legislature can initiate, but without the action of the Governor is powerless to complete. Not only do we beg to question when we infer the validity of the immunity from the possession by the Legislature of the full legislative power; we concede by implication that, unless the legislative power has been thus committed without division, the immunity must fail. The argument, reduced to that basis, is seen to be self-destructive. The grant of an immunity is in very truth the assumption of a legislative power, and that is why the Legislature, acting alone, is incompetent to declare it. It is the assumption of a power to annul as to individuals or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the county from the performance

of their duties, and the prosecuting officer from his. All these changes may be wrought through the enactment of a Statute. They may be wrought in no other way while the legislative structure of our government continues what it is."

Doyle v. Hoffstadter (1931), 257 N. Y. 244, 177 N. E. 489, 495.

Stuart v. Chapman (1908), 104 Me. 17, 70 Atl. 1069.

Spokane Grain & Fuel Co. v. Lyttakee (1910), 59 Wash. 76, 109 Pac. 316.

Gottstein v. Lister (1915), 88 Colo. 462, 153 Pac. 595.

It is significant, also, that Congress itself can provide for apportionment of representatives among the several states, only by law (Appendix E, p. 39), which must be submitted to and approved by the President, or repassed over his veto (Art. I, Sec. 7, U. S. Const.). Congress has never attempted to dictate to the states as to how their legislatures were to be made up. Nor can any intention, or act of Congress, be found in which it has attempted to deny, or defeat, the function of the governor as part of the legislative power of the state, if such function is provided by state law.

The framers of the federal Constitution intended, and expected, the legislative power of the state to be used in dividing the state into congressional districts. This seems clear but we will not enlarge on the reasons set out in the dissenting opinion (R., p. 58, f. 54).

Congress has consistently recognized and acted on the same construction and this is shown by the history of statutory apportionment (Appendix G, p. 41) particularly by reference to the Act of 1911 (Appendix H, p. 42), the

Act of 1926 (Appendix I, p. 44), and the Act of 1929 (Appendix J, p. 46). The debates, when the subject was being considered by Congress (Appendix K, p. 48) show, conclusively, that Congress intended and expected the division to be made by the state legislatures, in the same manner and by the same procedure, necessary under state law in enacting laws.

Consonant with the foregoing, all the state legislatures, for more than 140 years, have so construed their own powers in such matters the conclusion of the court below to the contrary notwithstanding. This is conclusively shown by the various applicable state constitutional provisions and statutes, and by reference to the history of redistricting in all the states (Appendix R, p. 63).

In Minnesota, until the present legislature of 1931, the above construction has been given to the words "prescribed in each state by the legislature thereof" (Art. I, Sec. 4, U. S. Const.). The framers of the State Constitution used the term "legislature" in Art. 4, Sec. 23, of the Minnesota Constitution in the same sense and in the light of the long-established practical construction of the same word in Art. I, Sec. 4, of the federal Constitution (Appendices M, N, and O, pp. 58-61). The districting last prior to the attempted enactment of House File 1456, was made in 1913 and in the usual course was made by law; that is, by a bill for an act duly approved by the governor (Laws Minn. 1913, Chap. 513) and this law was amended by the 1929 legislature, also as usual by law. (Laws Minn. 1929, Chap. 64.)

The 1931 legislature followed the usual and established method; for, it intentionally framed House File 1456 as a bill for an act; it intentionally, and in the usual course, submitted this bill for an act to the Governor for his approval; and it was only *after* the Governor vetoed the

bill, as unfair and unequal, that any intent arose to proceed by any other method. Even then it was the intent of the lower house, only, and not concurred in or acted upon by the Senate. It is therefore submitted that the belated intention of the House, alone, to convert the vetoed, unamended bill for an act into a concurrent resolution could have no such legal effect. But even if it had been submitted, and concurred in, by the senate, and the intent to proceed by resolution, rather than by bill for an act, could be said to be retroactive, the resolution would be invalid under the Constitution of Minnesota, if not submitted to, and approved by, the governor, or passed over his veto (Art. 4, Sec. 12, Minn. Const., Appendix M, p. 53). In any event, a concurrent resolution is not a law, and does not have the legal significance of a law; and could not repeal, amend or affect the existing law, or substitute for it something less than a law.

Sjoberg v. Security Savings & Loan Ass'n (1898), 73 Minn. 203 (212, 214), 75 N. W. 1116.

Doyle v. Hoffstadter (1931), 257 N. Y. 244, 177 N. E. 489.

Fitzgerald v. Voorhis (1918), 222 N. Y. 494, 119 N. E. 106.

People ex rel Argus Co. v. Palmer (1895), 12 Misc. 392, 33 N. Y. S. 1088; aff'd in 146 N. Y. 406 (2), 42 N. E. 543 (13).

City of Carlyle v. Nicolay (1929), 333 Ill. 562, 165 N. E. 211.

State v. Zimmerman (1925), 187 Wisc. 180, 204 N. W. 803 (812).

It may be argued that practical construction cannot be used and is of no value in the premises. The majority opinion below so holds. But the short and convincing answer is found in the dissenting opinion (R., p. 62, f.

58), namely, that the word "legislature" as used in Art. I, Sec. 4 (U. S. Const.) has been differently construed by courts of last resort. The meaning therefore is in doubt; and a resort to practical construction is proper. Indeed, the majority opinion resorts to practical construction to justify its conclusion that the Act of 1911 was limited to the apportionment then made and is no longer in force; yet when the petitioner attempted to fortify his argument, by reference to the history of the apportionment Acts of Congress, and the districting acts of the states, and particularly that of the State of Minnesota, the majority inconsistently said (R., p. 56, f. 51):

> "We are of the opinion that since the matter here involved arises out of the federal constitution and its meaning is so clear and the purpose is so apparent, the language being used in its ordinary meaning that there is no room for the application of the doctrine of practical construction."

However, aside from this inconsistency, it is confidently submitted that the practical construction here relied on by the petitioner is not only proper but of persuasive importance. Chief Justice White of this Court in *State ex rel Davis v. Hildebrandt, supra*, quoted applicable portions of the Congressional Record. See also:

Stuart v. Laird (1803), 5 U. S. (1) Cranch 298, 299, 2 L. Ed. 115.

Ex Parte Grossman (1924), 267 U. S. 87 (119), 45 Sup. Ct. 232, 69 L. Ed. 527.

McGrain v. Daugherty (1927), 273 U. S. 135 (174), 47 Sup. Ct. 319, 71 L. Ed. 580.

State v. Sullivan (1912), 117 Minn. 329, 135 N. W. 748.

Dunnell's Minnesota Digest (1910), Section 8952.

People v. Murray (1896), 149 N. Y. 367, 42 N. E. 584.

Matter of La Rocca v. Flynn (1931), 257 N. Y. 5 (13), 177 N. E. 290.

Story v. Craig (1921), 231 N. Y. 33 (40), 131 N. E. 560.

The uniform, and consistent, practical construction, by the framers of the federal Constitution and the state constitutions, by the Congress, and by the states for over 140 years, cannot be lightly ignored. In the face of this authority, the very recent acts of the legislatures of Minnesota and of New York only serve to emphasize the significance of the established practice.

Koenig v. Flynn (1931), Sup. Ct. N. Y. (Appendix T, p. 74).

As stated above, until 1931 no question had been raised, as to whether or not, the legislature, when dividing a state into congressional districts, was required to proceed by the usual method in enacting laws. Heretofore cases have arisen only over the question as whether or not the referendum was included in the procedure. In *State ex rel Davis v. Hildebrandt, supra,* it was assumed, in the briefs of counsel, that the governor was a part of the legislative power. The decision in that case construes the word "legislature" in Art. I, Sec. 4 (U. S. Const.) as meaning "legislative power," "legislative authority," "state legislative power." In the later case of *State ex rel Hawke v. Smith, supra,* this Court used the same, and similar terms, to distinguish between the function, and the act, of the state legislature when ratifying an amendment to the federal Constitution, and when dividing a state into congressional districts. We feel that no further authority is necessary. However, solely for the information of the Court, we cite the decisions of the Supreme Court of

the State of South Dakota, and of the Supreme Court of the State of New York, and of the Circuit Court of the State of Illinois:

State ex rel Schrader v. Polley (1910), 26 S. D. 5, 127 N. W. 848.

Koenig v. Flynn (1931), Supreme Court, New York (Appendix T, p. 74).

Moran v. Bowley (1931), Circuit Court, Ill. (Appendix S, p. 66).

It is needless to point out that these decisions consistently follow, and reach the same conclusions, as do the two decisions of this Court just cited.

While the respondent argues that, linguistically, the word "legislature" in Art. I, Sec. 4 (U. S. Const.) may and should be construed so as to limit its meaning to the two houses of the legislature, there can be no doubt, under the decisions of this Court, and under the long-established practice, that the true meaning includes the governor, and embraces the entire legislative power of the state. The latter construction is urged here as the proper one to produce the best consequences throughout the nation. To sustain the judgment below limiting the meaning of "legislature" in Art. I, Sec. 4 (U. S. Const.) to the two houses of the state legislature would reverse the Hildebrandt case and nullify the intention of Congress; or, as Mr. Justice Stone well says, if the term "legislature" as used in Art. I, Sec. 4, "does not refer to the legislative power of the state, however exercised, but is confined to the members of the legislatures, as such, and so excludes legislative veto, it equally excludes veto by referendum, and both the opinion of Congress and the decision in the Hildebrandt case are wrong" (R., p. 61, f. 57). It may be added, that it would also reverse the decisions of the state courts

above cited and upset and annul the long-established, uniform procedure throughout the entire nation.

Point B.

(Assignments of Error 1 and 3.)

House File 1456 is Invalid Because It Does Not Comply with Existing Federal Constitutional Provisions and Statutory Regulations.

The majority below holds, that because, in its opinion, the Act of August 8, 1911, is "no longer in the picture," therefore the power of the 1931 Minnesota legislature, to redistrict the state, "is unrestricted, unlimited and absolute" (R., p. 57, f. 52); that Congress in the Act of June 18, 1929, had "reverted to the character of the legislature, in vogue, prior to 1911, when no control over legislative method was attempted" (R., p. 55, f. 50); and that the only restraint, recognized by the court, are that the "members are amenable to their constituents" and that the exercise of the power "must depend largely upon the integrity of the legislature" (R., p. 56, f. 51).

With these statements and conclusions we respectfully disagree. We submit that Sections 3 and 4 of the Act of 1911 are still in force, and require districts to be equal in number of inhabitants and contiguous and compact as to territory. We disagree with the suggestion, that prior to 1911, there was no subsisting restraint, on the state legislatures, when dividing a state into congressional districts; that since June 18, 1929, the legislatures are unrestricted, unlimited and absolute; and that they are under no restraint whatever by federal law. We cannot agree with the conclusion that the constituents of the members, and the "integrity of the legislature," are the only restraint on that body. With respects to the latter,

it perhaps may be remarked, that the same legislature which attempted to enact House File 1456 also enacted Chapter 105 of the Laws of Minnesota, 1931. This law, in words practically paraphrasing Section 3 of the Act of 1911, requires commissioner districts within the various counties of the state to be laid out so as to contain an equal number of inhabitants and to be contiguous in territory (Appendix P, p. 62).

We have presented, above, the argument that Art. I, Sec. 4 of the United States Constitution, insofar as it requires the districting to be done by the "legislature," is itself a restraint. Another restraint exists in the Fourteenth Amendment which prohibits the denial of the equal protection of the law. This restraint will be discussed under Point C. In addition we claim that the courts are always available to keep the state legislatures within the bounds of a reasonable and lawful exercise of their powers. This restraint will be discussed under Point D.

The opinion below was based upon the assumption that the Act of 1911 is no longer in force, and ignores the facts that since 1842 districts must be made up of contiguous territory; that since 1872, just after the adoption of the Fourteenth Amendment, districts must contain an equal number of inhabitants; and that since 1901 districts must also be compact in territory (Appendix G, p. 41). But we insist that the Act of 1911 is still in force and effect for other reasons.

(1) Because of the language of the act itself (Appendix H, p. 42).

The Act of 1911 deals with two distinct subjects: (a) with the aggregate number of representatives apportioned among the several states (Sections 1 and 2); and (b) with the manner and the method of laying out con-

gressional districts (Sections 3, 4 and 5). Notwithstanding this, the claim of respondent and the opinion of the court below, is to the effect that the title to the act indicates the intention of Congress, and that thereby the entire act, for all purposes, accordingly, is limited, as to its duration. But the title to the Act is no part of the Act, particularly under the Federal system (*Haddon v. Barney* (1867), 73 U. S. 107, 18 L. Ed. 518). Hence it follows that while, for some purposes, the title, perhaps, might be looked to in an effort to discover an intention on the part of Congress to limit the duration of Sections 1 and 2, yet nothing therein indicates such intention as regards Sections 3 and 4; because these sections deal expressly and specifically with the manner and method of dividing a state into congressional districts—a subject entirely separate and distinct. They require an equality, in number of inhabitants, and contiguity and compactness, in territory and expressly provide that "representatives to the Sixty-third, and each subsequent Congress," shall be elected from such districts. Section 5 refers only to the nomination and election of candidates at large. The title is silent as to all of these matters.

In this connection it is to be pointed out that the phrase "in each State entitled under this apportionment to more than one Representative" modifies the word "State" as used in Section 3 by designating the States that shall elect Representatives from districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. This construction is apparent if we omit that part of the above quoted phrase reading, "entitled under this apportionment to more than one Representative." And we submit this language clearly does not limit the provisions of Section 3 to the period covered by the 1910 census.

(2) Because Congress intended Sections 3 and 4 of the Act of 1911 to be permanent.

Following the Census of 1920 no new apportionment act was passed by Congress; but Congress permitted, and intended, that Sections 3 and 4 should continue to control. This alone refutes the argument of the respondent, and the opinion of the court below, that the Act of 1911 was limited, by its own terms, to the apportionment then made. Further, in 1925 and 1926 Congress incorporated Sections 3 and 4 into the code of permanent laws. (Appendix I, p. 44). It will be observed that this was fifteen years after the Act of 1911 was passed and six years after the 1920 Census. It is also of real significance, that, in so incorporating these provisions, appropriate changes were made in the title and text.

We take it that respondent must and does concede, as the court below did, that if Section 3 of the Act of 1911 is still in force the petitioner must prevail. But the respondent argues, and the court below held, that the Act of 1911 is no longer in force, because, it was limited, by its own terms, to the apportionment then made. We believe that we have disposed of this argument. But it remains to be pointed out that if the Act of 1911 expired by its own limitations, the argument of respondent, upheld by the court below, that it was repealed by the Act of 1929 is, to say the least, inconsistent and that one or the other of these views must be wrong.

(3) Because Sections 3 and 4 of the Act of 1911 have never been expressly repealed.

The only repeal section found in any later apportionment act is found in Section 21 of the Act of 1929; but this section is not an express repeal of Sections 3 or/and 4 of the Act of 1911.

(4) Because Sections 3 and/or 4 of the Act of 1911 have never been impliedly repealed.

The Act of 1929, as the court below agrees, is primarily a census act (Appendix J, p. 46). In the first instance it was designed, as the report of the Committee on Commerce of the Senate shows, to deal, only, with the subject of the census of 1930. The first 20 sections are addressed exclusively to that subject. The next section, the 21st, provides that "all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed." These 21 sections constituted the entire act as originally intended and drafted. Section 22, dealing with a second and different subject, the apportionment of the total number of Congressmen among the several states, was an afterthought and was added to the otherwise complete bill dealing with the census. The third and distinct subject of congressional districts, the manner and method of laying them out, prescribed in sections 3 and 4 of the Act of 1911 does not appear, and was not intended, to be dealt with, in the Act of 1929. For the first time in the history of congressional apportionment, a single act deals with both census and apportionment. Up to 1929 the former was always provided by a separate act passed *in advance* of the census to be taken. The apportionment invariably was made by a separate act passed *after* the census was taken. The Act of 1929 is therefore unique in providing for apportionment in advance of the census upon which the apportionment was to be based. So much of the Act of 1929, viz.: Sec. 22, as deals with apportionment, follows rather than precedes, the repealing clause in Section 21. This is significant. It is significant because of the facts just mentioned—the contents of the first twenty sections, the position of the repealing clause, and the novelty of join-

ing thereto an apportionment act in advance of the census to be taken. The conclusion is irresistible that section 21 as a repealing clause is addressed, solely and strictly, to prior legislation dealing with the single subject of census. We submit it does not even extend to the second subject, the apportionment of representatives among the several states, although we will not argue the point. But we most earnestly contend that the repealing clause clearly is not addressed to the third, distinct subject—the manner and method of laying out districts—and therefore there can be no implied repeal of sections 3 and 4 of the Act of 1911.

It is an elementary principle of statutory construction that repeals by implication are not favored.

Graham v. Goodcell (1931), 282 U. S. 409 (425), 51 Sup. Ct. 186, 75 L. Ed. 415.

Cooley's Const. Lim., 5 Ed., p. 183.

25 *R. C. L.*, p. 918, Sec. 169.

and that in any event consistent portions of prior laws are not repealed.

Henderson's Tobacco (1870), 78 U. S. 652, 20 L. Ed. 235.

Kennedy v. U. S. (1924), 265 U. S. 344, 44 Sup. Ct. 501, 68 L. Ed. 1045, 25 R. C. L., pp. 920, 922, Sec. 170-171.

The court below held, however, that "some portions of the 1929 law were inconsistent with the same sections in the 1911 law" (R., p. 49, f. 43). This we respectfully submit is an inaccurate and misleading conclusion. The court did not point out the inconsistent portions and none can be designated; because, barring the first twenty sections of the Act of 1929, which are not applicable, there is no inconsistency. The latter act, and section 3 of the Act of 1911, are not duplications, or mutually contradic-

gressional districts (Sections 3, 4 and 5). Notwithstanding this, the claim of respondent and the opinion of the court below, is to the effect that the title to the act indicates the intention of Congress, and that thereby the entire act, for all purposes, accordingly, is limited, as to its duration. But the title to the Act is no part of the Act, particularly under the Federal system (*Haddon v. Barney* (1867), 73 U. S. 107, 18 L. Ed. 518). Hence it follows that while, for some purposes, the title, perhaps, might be looked to in an effort to discover an intention on the part of Congress to limit the duration of Sections 1 and 2, yet nothing therein indicates such intention as regards Sections 3 and 4; because these sections deal expressly and specifically with the manner and method of dividing a state into congressional districts—a subject entirely separate and distinct. They require an equality, in number of inhabitants, and contiguity and compactness, in territory and expressly provide that "representatives to the Sixty-third, and each subsequent Congress," shall be elected from such districts. Section 5 refers only to the nomination and election of candidates at large. The title is silent as to all of these matters.

In this connection it is to be pointed out that the phrase "in each State entitled under this apportionment to more than one Representative" modifies the word "State" as used in Section 3 by designating the States that shall elect Representatives from districts composed of contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. This construction is apparent if we omit that part of the above quoted phrase reading, "entitled under this apportionment to more than one Representative." And we submit this language clearly does not limit the provisions of Section 3 to the period covered by the 1910 census.

(2) Because Congress intended Sections 3 and 4 of the Act of 1911 to be permanent.

Following the Census of 1920 no new apportionment act was passed by Congress; but Congress permitted, and intended, that Sections 3 and 4 should continue to control. This alone refutes the argument of the respondent, and the opinion of the court below, that the Act of 1911 was limited, by its own terms, to the apportionment then made. Further, in 1925 and 1926 Congress incorporated Sections 3 and 4 into the code of permanent laws. (Appendix I, p. 44). It will be observed that this was fifteen years after the Act of 1911 was passed and six years after the 1920 Census. It is also of real significance, that, in so incorporating these provisions, appropriate changes were made in the title and text.

We take it that respondent must and does concede, as the court below did, that if Section 3 of the Act of 1911 is still in force the petitioner must prevail. But the respondent argues, and the court below held, that the Act of 1911 is no longer in force, because, it was limited, by its own terms, to the apportionment then made. We believe that we have disposed of this argument. But it remains to be pointed out that if the Act of 1911 expired by its own limitations, the argument of respondent, upheld by the court below, that it was repealed by the Act of 1929 is, to say the least, inconsistent and that one or the other of these views must be wrong.

(3) Because Sections 3 and 4 of the Act of 1911 have never been expressly repealed.

The only repeal section found in any later apportionment act is found in Section 21 of the Act of 1929; but this section is not an express repeal of Sections 3 or/and 4 of the Act of 1911.

(4) Because Sections 3 and/or 4 of the Act of 1911 have never been impliedly repealed.

The Act of 1929, as the court below agrees, is primarily a census act (Appendix J, p. 46). In the first instance it was designed, as the report of the Committee on Commerce of the Senate shows, to deal, only, with the subject of the census of 1930. The first 20 sections are addressed exclusively to that subject. The next section, the 21st, provides that "all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed." These 21 sections constituted the entire act as originally intended and drafted. Section 22, dealing with a second and different subject, the apportionment of the total number of Congressmen among the several states, was an afterthought and was added to the otherwise complete bill dealing with the census. The third and distinct subject of congressional districts, the manner and method of laying them out, prescribed in sections 3 and 4 of the Act of 1911 does not appear, and was not intended, to be dealt with, in the Act of 1929. For the first time in the history of congressional apportionment, a single act deals with both census and apportionment. Up to 1929 the former was always provided by a separate act passed *in advance* of the census to be taken. The apportionment invariably was made by a separate act passed *after* the census was taken. The Act of 1929 is therefore unique in providing for apportionment in advance of the census upon which the apportionment was to be based. So much of the Act of 1929, viz.: Sec. 22, as deals with apportionment, follows rather than precedes, the repealing clause in Section 21. This is significant. It is significant because of the facts just mentioned—the contents of the first twenty sections, the position of the repealing clause, and the novelty of join-

ing thereto an apportionment act in advance of the census to be taken. The conclusion is irresistible that section 21 as a repealing clause is addressed, solely and strictly, to prior legislation dealing with the single subject of census. We submit it does not even extend to the second subject, the apportionment of representatives among the several states, although we will not argue the point. But we most earnestly contend that the repealing clause clearly is not addressed to the third, distinct subject—the manner and method of laying out districts—and therefore there can be no implied repeal of sections 3 and 4 of the Act of 1911.

It is an elementary principle of statutory construction that repeals by implication are not favored.

Graham v. Goodcell (1931), 282 U. S. 409 (425), 51 Sup. Ct. 186, 75 L. Ed. 415.

Cooley's Const. Lim., 5 Ed., p. 183.

25 *R. C. L.*, p. 918, Sec. 169.

and that in any event consistent portions of prior laws are not repealed.

Henderson's Tobacco (1870), 78 U. S. 652, 20 L. Ed. 235.

Kennedy v. U. S. (1924), 265 U. S. 344, 44 Sup. Ct. 501, 68 L. Ed. 1045, 25 R. C. L., pp. 920, 922, Sec. 170-171.

The court below held, however, that "some portions of the 1929 law were inconsistent with the same sections in the 1911 law" (R., p. 49, f. 43). This we respectfully submit is an inaccurate and misleading conclusion. The court did not point out the inconsistent portions and none can be designated; because, barring the first twenty sections of the Act of 1929, which are not applicable, there is no inconsistency. The latter act, and section 3 of the Act of 1911, are not duplications, or mutually contradic-

tory; but are complementary and mutually consistent. This all clearly appears from the debates, when the question of possible conflict was before the Congress (Appendix K, p. 48). We confidently submit that reference to this material will show conclusively, that it was, and is, the intention of Congress, made effective by its action, to continue section 3, of the Act of 1911, in force and effect. We will not take the space to set out the precise language, but earnestly urge the Court to refer to the Congressional Record, the excerpt from which appears in Appendix K (p. 48), for an accurate statement of what took place when this bill was under consideration.

If this be true, it hardly need be said, then, that on the admission of the court below, House File 1456 is invalid, because it violates the provisions of section 3 of the Act of 1911.

Point C.

(Assignments of Error 1 and 4.)

House File 1456 Is Invalid Because It Is Unequal and Discriminatory.

The Fourteenth Amendment to the federal Constitution was, and is, likewise a subsisting restriction, on the legislatures of the several states, in the exercise of the power to divide the states into congressional districts. Insofar as the Minnesota legislature, for 1931, has acted, for the purposes discussed under Point A, *supra*, the legislature is prohibited from exercising its powers in an arbitrary and unreasonable manner. It cannot act, so as to deny, and abridge the rights of the petitioner under the equal protection clause. It cannot deny, and abridge, the rights of the citizens, and qualified voters, in the various districts, by unjust and unreasonable discriminations, between them. The court below, summarily, dismissed

all consideration of the Amendment by holding that it was inapplicable in the premises and that it was not violated by House File 1456. The court said: "Suffrage is not one" of the "privileges and immunities" of citizens. With these conclusions we respectfully disagree. We submit that the statement relative to suffrage is beside the point, as well as misleading; because the principle involved, in the case at bar, is not the power of the state to require reasonable and uniform qualifications, or other lawful requirements, as conditions precedent, to the privilege of voting. We are not concerned with the situation, where because of the refusal or inability to satisfy such requirements, the state withholds from a would-be voter the privilege of suffrage. What we challenge is the discrimination, and the lack of the equality, between qualified voters—the violation of the rights of the petitioner, as a citizen and qualified voter—and the violation of the rights of all other citizens and qualified voters in the various districts.

That the violation in any form of such rights derived from the federal government is prohibited to the states and, when properly challenged, that the courts will protect such rights, is clear.

Nixon v. Herndon (1927), 273 U. S. 536, 47 Sup. Ct. 446, 71 L. Ed. 759.

Swafford v. Templeton (1902), 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005.

See also:

Civil Rights Cases (1883), 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 836.

Standard Scales Co. v. Farrell (1919), 249 U. S. 571 (577), 39 Sup. Ct. 380, 63 L. Ed. 780.

Maxwell v. Bugbee (1919), 250 U. S. 525 (537, 538), 40 Sup. Ct. 2, 63 L. Ed. 1124.

Power Co. v. Saunders (1927), 274 U. S. 490 (493, 497), 47 Sup. Ct. 678, 71 L. Ed. 1165.

The inequality and lack of compactness under House File 1456 are substantial and not trivial. In the following decisions the same vices were apparent in the division of states for local purposes, and relief was granted by the courts.

People ex rel Baird v. Supervisors (1893), 138 N. Y. 95, 33 N. E. 827.

Sherrill v. O'Brien (1907), 188 N. Y. 185, 81 N. E. 124.

In Re Dowling (1916), 219 N. Y. 44, 113 N. E. 545.

See also cases cited on page 36 hereof.

Let us analyze briefly the division made under House File 1456. On the basis of a population of 2,551,583, each of nine congressional districts should contain 283,509 inhabitants. Under House File 1456 four districts—1, 2, 8 and 9—have less than that number. One district only, the 4th, has approximately that number. Four districts—3, 5, 6 and 7—have more. The smallest district, the 1st, contains 115,904 less than the largest district, the 5th. The difference in percentage exceeds fifty per cent! In other words, two voters in the 1st district enjoy political rights equal to, and thereby receive a privilege over, three voters in the 5th district; or putting the matter another way, three voters in the 5th district enjoy political rights equal only to two voters in the 1st district. The same is approximately true as between citizens and voters of the 1st and the 7th districts. Marked differences are present also between other districts. If the number of inhabitants in the 1st district, under House File 1456, is taken as the basis for all nine districts, only 2,057,354 inhabitants of the State are

represented in Congress. Almost a half million inhabitants are not represented at all!

The political rights of self-government and equal representation in the federal law-making body, its composition and action are thus denied to all citizens of the State of Minnesota by House File 1456. Its vices are all the more shocking because the discrimination is in favor of the rural districts at the expense of the urban districts. It is common knowledge that the latter increase in population more rapidly than do the rural districts. Hence, if House File 1456 is permitted to stand, the present discrimination will persist and will constantly increase during the next ten years. The Governor's message, accompanying his veto of House File 1456, characterizes the difference in population "as obviously an inequitable distribution of the population of Minnesota" and further emphasizes the "unfair discrimination between agricultural districts" in a state which is essentially "an agricultural state" (R., p. 6, f. 7).

The lack of compactness is shown by the maps of the State and of Minneapolis (R., pp. 17-19, ff. 19, 20). The 3rd district, in no sense, can be said to be compact; for starting in Washington County on the eastern border of the state it winds its circuitous way southward into Goodhue County, north into Carver County, northeast into Hennepin County, and into part of the City of Minneapolis therein; thus almost entirely surrounding Ramsey County and the 4th congressional district. The 7th district among others, is an obviously flagrant violation of the principles of compactness, for this district starts at the western edge of the state, and sweeps clear across the state, to include two wards of the City of Minneapolis, almost on the eastern border. The territory embraced in this district, moreover, has different and perhaps even hostile

interests, the greater area being essentially agricultural; the other being a portion of the highly concentrated urban population of the largest city of the state, and its chief industrial center.

The respondent takes the position that he is not obliged to justify the division made by House File 1456. He argues that it is sufficient that the legislature has acted. In this view the majority of the court below agree. But if they are correct in this, it is idle and inconsistent for the respondent to argue that the matter of dividing a state into congressional districts is a delicate and difficult matter; and that the legislature in House File 1456 made the best possible division. It is idle for the same reasons for respondent to seek to minimize the inequality and the lack of compactness. Moreover by the demurrer all the allegations of the petition are admitted.

Point D.

(Assignments of Error 1 and 5.)

The Courts Have Power to Grant Relief and the Court Below Was Under the Duty to Grant Relief in the Premises.

The respondent argues that the courts have no power to grant relief in the premises. This opinion seems to be shared by the court below, but it is submitted that there can be no question as to the existence of the power of the courts to grant such relief. The only question which can arise is, whether a given case presents the occasion, when it is proper and necessary to exercise the power. The court below concedes this when it states "though a case might arise that would require our disapproval, this does not seem to be such" (R., p. 56, f. 51).

The respondent attempted, below, and apparently succeeded, in warping an established principle of American law in his favor. That is, he sought, by attempting to minimize the vices of House File 1456, to demonstrate that this was not a proper case in which to grant relief. The respondent went further and sought to convince the court below that it could not grant relief, by urging the dire results to follow should House File 1456 be declared invalid. He stressed the undesirable result of having no districting act on the books, the undesirability of having Minnesota's representatives elected at large, and the expense involved in calling a special session of the legislature to make another division. All of this, we submit, is immaterial in this proceeding, and also that it is no fault of the petitioner and the other citizens and voters of the state. Let the responsibility rest with the 1931 legislature and those who advised it. This argument, in any event, should not be considered by the courts especially where it opposes the fundamental rights of citizens and voters throughout the entire state. These important rights should not be sacrificed to save a few dollars; or to save the members of the legislature a little inconvenience; particularly in this case, because here the legislature might have avoided such results, and it alone made any inconvenience necessary.

Nor is the petitioner under any duty to suggest a better, or more equitable, division of the state. That is solely for the legislature in the first instance. The petitioner alleged in the petition below that the division under House File 1456 was not fair, was not equal, was not contiguous and compact, and was not the best possible division. The Governor's message likewise assigns these defects as reasons in vetoing the bill (R., pp. 5-6,

ff. 6, 7). The respondent by his demurrer admits this. No more need be said.

One more argument made below is likewise fallacious. The respondent argued that to permit the governor to annul a division made by the legislature, regardless of its fairness or result, is to deny a fundamental American principle, that the majority should rule. But the argument is so unsound as to hardly merit an answer. It completely ignores not only the provisions of the State Constitution which conferred the veto power upon the executive; but also ignores the fundamental principle, underlying the system of checks and balances, between the three great departments in our system of government. In this case, it is suggested that the principle is vindicated; because the veto power was asserted by a vigilant and patriotic governor to check an admittedly unfair and unequal act of the legislature. The petitioner contends that House File 1456 was designed for questionable political purposes, only, and deliberately violated the basic principles of equality in the enjoyment of political rights by the petitioner and by all the people of the state.

While the state judiciary may be reluctant to grant relief, in cases where the action of the legislature is questioned, especially where, as in the case at bar, the court appreciates that the legislature is performing an act subject to federal regulation; and while ordinarily the propriety or necessity for action by the courts may be raised in a given case, it is earnestly contended that the case at bar is not such a case. The failure of the court below to grant relief was not merely due to reluctance, but to excessive caution. The court, it is respectfully submitted, was in error in not granting the relief sought, because the facts alleged by the petitioner were admitted by the demurrer. Under these admitted facts the court, as the

guardian of the constitutional rights asserted, was under the duty to grant the relief sought and to uphold the Constitution.

That the state courts generally have not hesitated to grant relief in similar cases where the legislature's division of the state into districts and subdivisions for state purposes was challenged for the same reasons, is apparent from the following representative cases:

Stiglitz v. Schardien (1931), — Ky. —, 40 S. W. (2) 315.

People v. Tremain (1929), 252 N. Y. 27, 168 N. E. 817.

Doyle v. Hoffstadter (1931), 257 N. Y. 244, 177 N. E. 489.

State v. Cunningham (1892), 81 Wisc. 440, 51 N. W. 724.

State v. Cunningham (1892), 83 Wisc. 90, 53 N. W. 35.

Giddings v. Blacker (1892), 93 Mich. 1, 52 N. W. 944.

Putnam v. Pyle (1930), — S. D. —, 232 N. W. 20.

Brooks v. State (1904), 162 Ind. 568, 70 N. E. 980.

Koenig v. Flynn (1931, Supreme Court, N. Y.), Appendix T herein, page 74.

Moran v. Bowley (1931, Circuit Court, Illinois), Appendix S herein, page 66.

See also cases cited at page 31 hereof.

It may be noted, too, that the question of interference by the federal courts with a sovereign state is not present. The court below is of the opinion that the power of the legislature is derived solely from the federal government and that the exercise of the power is subject to regulation by federal law. Moreover, either under this theory, or the theory that the power is inher-

ent and reserved in the states, we still have the situation that there is, in the case at bar, no action by a sovereign state. At best, we have only the action of the legislature; indeed it may be truly said we have action by a part of the legislature only. As against this action of the legislative department of the government, or part of it, we have the positive veto of the executive branch of the government, and an avowed intent on the part of the Governor to oppose and defeat the action of the legislative department. The action of the legislature is no more the action of the sovereign state than is the action of the Governor. Nor is the determination of the Supreme Court of the State binding upon this Court; for the reason among others that the exercise of the power to divide the state, regardless of its source, is subject to the provisions of the federal Constitution and to regulation by Congress.

Therefore the questions whether or not the power was exercised by the "legislature" within the meaning of Art. I, Sec. 4 (U. S. Const.), and whether the exercise of the power is within, or complies with, such federal constitutional provisions and statutory law, are federal questions; and no decision by a state court can preclude this Court from determining these questions.

This Court has stated that when essential to the enforcement of rights asserted under the federal Constitution, it will review the decision of a state court.

Beidler v. So. Car. Tax Comm'n (1930), 282 U. S. 1, 51 Sup. Ct. 54, 75 L. Ed. 69.

Mitchell v. Clark (1884), 110 U. S. 633, 4 Sup. Ct. 170, 28 L. Ed. 279.

Carter v. Texas (1900), 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

Rogers v. Hennepin County (1916), 240 U. S. 184, 36 Sup. Ct. 265, 60 L. Ed. 594.

California v. Deseret Water Co. (1917), 243 U. S. 415, 37 Sup. Ct. 394, 61 L. Ed. 821.

Blodgett v. Silbermann (1928), 277 U. S. 1, 48 Sup. Ct. 410, 72 L. Ed. 749.

People v. Baldwin (1930), 341 Ill. 604, 174 N. E. 51.

CONCLUSION.

It is therefore respectfully submitted that the case at bar is one calling for the exercise, by this Court, of its supervisory powers; in order that a question of nation-wide importance shall be determined; in order that the practice of political gerrymandering shall be authoritatively stamped as disapproved; and to correct error of the Supreme Court of the State of Minnesota. That to such end a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Minnesota and finally reverse it.

Respectfully submitted,

GEORGE T. SIMPSON,
Counsel for Petitioner,
730 Security Building,
Minneapolis, Minnesota.

JOHN A. WEEKS,
736 Andrus Building,
ALFRED W. BOWEN,
1360 Rand Tower,
F. J. DONAHUE,
414 Hodgson Building,
W. YALE SMILEY, *pro se,*
910 McKnight Building,
Minneapolis, Minnesota,
Of Counsel.

APPENDIX.

[*Note: The Appendices begin with E, to avoid confusion with Exhibits A and B, and Appendices C and D, in the Record. There are no omissions. Because the question in the case at bar is new, in some aspects at least, we have set out, for the information of the Court, some material which would not otherwise be included here. But we have attempted to present only important and relevant material and have condensed it as much as possible without destroying its value to the Court. All italics used herein are ours.*]

APPENDIX E.

United States Constitution—Article I, Sec. 4.

Sec. 4. The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

APPENDIX F.

United States Constitution—Amendment XIV.

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

* * * *

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G.

Table of Congressional Statutes, dealing with the subjects of: (1) Taking the Federal Census; (2) Apportioning Among the Several States the Total Number of Representatives in Congress; and (3) Regulating the Manner and Method of Laying Out Congressional Districts within the Several States.

Census	*Apportionment*	*Title*	*Remarks*
1790	1792	1 St. L. 253	Deals only with Subject (2) above
1800	1802	2 St. L. 128	" " " (2) "
1810	1811	2 St. L. 669	" " " (2) "
1820	1822	3 St. L. 651	" " " (2) "
1830	1832	4 St. L. 516	" " " (2) "
1840	1842	5 St. L. 491	Deals with (2) and also with (3) above. Section 2 requires the districts to be contiguous as to territory.
1850	1852	(9 St. L. 428 (10 St. L. 25	Deals only with Subject (2) above
1860	1862	12 St. L. 353	" " " (2) "
1870	1872	17 St. L. 28, 192	Deals with (2) and (3)—Districts to be "prescribed by law"—to be equal in number of inhabitants and contiguous as to territory.
1880	1882	22 St. L. 55	Deals with (2) and (3)—Districts to be contiguous—and equal in number of inhabitants. For the first time a repealing clause is included, viz.: all inconsistent acts.

Census	Apportionment	Title	Remarks
1890	1891	26 St. L. 735	Deals with (2) and (3)—Districts to be "prescribed by law," to be equal in number of inhabitants and contiguous as to territory.
1900	1901	31 St. L. 733	Deals with (2) and (3)—to be equal in number of inhabitants and contiguous as to territory. Provides that where the number of Representatives for a State is decreased, they shall run at large unless new districts are laid out before the next election.
1910	1911	37 St. L. 13	Deals with (2) and (3)—Districts to be equal as to population, contiguous, and "prescribed by law"—and now mentioned for the first time—compact as to territory. Provision in case of decrease as in 1901 Act. (Appendix H.)
1920			No statute enacted.
1930	1929	46 St. L. 26	Deals only with (1) and (2)—Repealing clause as to inconsistent acts. (Appendix J.)

[*Note—Until 1929 all Census Acts, Subject (1) supra, were separate and passed prior to Apportionment Acts, Subject (2).*]

APPENDIX H.

The Act of August 18th, 1911 (37 St. L. 13).

Chap. 5.—An Act for the apportionment of Representatives in Congress among the several states under the Thirteenth Census.

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That after the third day of March, 1913, the House of Representatives shall be composed of four hundred thirty-three members, to be apportioned among the several states as follows:

[*Here follows a list of the States with the number of Representatives allotted to each. Minnesota has ten.*]

Sec. 2. [Provision is made for the territories of Arizona and New Mexico and providing, in the event of their admission to the Union, that their Representatives shall be in addition to the 433 provided for in Section 1.]

Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third *and each subsequent Congress* shall be elected *by districts* composed of *a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.* The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Sec. 4. That in case of an increase in the number of Representative in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and other Representatives by the districts *now prescribed by law* until such state shall be redistricted *in the manner provided by the laws thereof* and in accordance with the rules enumerated in Section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts *now prescribed by law* until such State shall be redistricted as herein prescribed.

Sec. 5. [Provides that where Congressmen are to be elected at large, they shall be elected in the same man-

ner as candidates for governor, unless otherwise provided by laws of the State.]

APPENDIX I.

An Act to Consolidate, Codify, and Set Forth General and Permanent Laws of the United States in Force December Seventh, One Thousand Nine Hundred and Twenty-five.

(Act of June 30, 1926, c. 713, 44 Stat. 773.)

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated "The Code of the Laws of the United States of America."

Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District of Columbia, and of each State, Territory, or insular possession of the United States—

(a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish *prima facie* the laws of the United States, general and permanent in their nature in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments * * *.

[Note: The United States Code incorporates Sections 3 and 4 of the foregoing Act of 1911 under Title 2—The Congress, Chapter 1; Election of Senators and Representatives, omitting certain material indicated by stars, viz.:]

Sec. 3. Election by districts.—In each State entitled under this apportionment to more than one Representative, the Representatives to* Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Sec. 4. Additional Representatives at Large.—In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts **prescribed by law *on August 8, 1911,* until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three***; and if there be no change in the number of Representatives from a state, the Representatives thereof shall be elected from the districts**** prescribed by law *on August 8, 1911,* until such State shall be redistricted as herein prescribed.

*"the Sixty-third and each subsequent"—is omitted.

**"now"—is omitted.

***"of this Act"—is omitted.

****"now"—is omitted.

[Note:—The matter in italics is new in the Code; and was not in the 1911 Act.]

APPENDIX J.

The Act of 1929, 46 St. L. 26, June 18, 1929.

Chap. 28.—An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to Provide for the Apportionment of Representatives in Congress.

Secs. 1 to 20, inclusive. [*Provide for the taking of the 1930 Census, outline the machinery, designate the federal officials, their duties, etc.*]

Sec. 21. That the Act establishing the permanent Census Office, approved March 6, 1902, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That an Act entitled "An Act to provide for the fourteenth and subsequent decennial censuses," approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.

Sec. 22. (a) On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;

(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions. No State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States, as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one Member.

(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent Statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under Sections 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives-elect.

(c) This section shall have no force and effect in respect to the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted

to the Congress within the time prescribed in subdivision (a).

[*Note: The preceding Section No. 22 has been incorporated into the permanent Code of the United States Laws as Title 2, Section 2 (a)*].

APPENDIX K.

CONGRESSIONAL RECORD.

Vol. 71—Part 2, p. 2279.

"* * * * Mr. Reed of New York. Yes; I will read the amendment.

Mr. Montague. So that it may appear in the Record?

Mr. Reed of New York. That is what I plan to do. At the end of the bill, if the bill should not be emasculated by removing some of the other sections, I shall introduce this as Section No. 23.

'Nothing in this act contained shall be construed to prevent the legislature of any state (subject, however, to the initiative and referendum law in any state wherein such a law exists), at any time after the approval of this act, in order to secure contiguous and compact territory and equalization of population in accordance with the rules enumerated in Section 3 of the apportionment act, approved August 8, 1911, by concurrent resolution, redistricting the state for the purpose of electing Representatives to Congress, and upon each and every such redistricting the Representatives to Congress shall in any such state be elected from the new districts so formed.' "

Vol. 71—Part 3, Pages 2363-4.

"* * * * Mr. Reed of New York. Mr. Chairman, I offer the following amendment which I send to the desk.

The Clerk reads as follows:

Page 18, line 9, after the word 'section,' insert a new section as follows:

'Section 23. Nothing in this act contained shall be construed to prevent the legislature of any States (subject, however, to the initiative and referendum law in any State wherein such a law exists), at any time after the approval of this act, in order to secure contiguous and compact territory and equalization of population in accordance with the rules enumerated in Section 3 of the apportionment act, approved August 8, 1911, by concurrent resolution, redistricting the State for the purpose of electing Representatives to Congress, and upon each and every such redistricting the Representatives to Congress shall in any such State be elected from the new districts so formed.'

Mr. O'Connor of New York. Mr. Chairman, I make the point of order against the amendment. It is not germane to the bill. I would be very glad to have the Chair hear me if the Chair has any doubt about it.

The Chairman. The Chair had his attention called to this amendment by the gentleman from New York (Mr. Reed), who placed it in the Record yesterday, and it will be found on Page 2279. The Chair will ask the gentleman from New York who offered the amendment whether he can point to any portions in the pending bill which refer to the matter of the redistricting of the States by the legislatures of the States?

Mr. Reed of New York. Mr. Chairman, we are dealing with a reapportionment act, and under Article 1, Section 4, of the Constitution it is provided as follows:

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators.

That gives us authority and makes it germane to this bill.

The Chairman. The gentleman's citation of the Constitution of the United States, the Chair thinks, would have no bearing on the pending bill. We are not considering any amendment to the Constitution. We are considering the present bill and amendments thereto. The Chair desires to give the gentleman an opportunity to show how the pending bill in any way relates to the redistricting of the States by the legislatures, if he can. The Chair has not been able to find anything in the bill which would relate to that subject."

Vol. 71—Part 3, Pages 2443-2444.

"• • • • Mr. Reed of New York. Mr. Chairman, prior to August 8, 1911, the apportionment act of that year, it was always provided in the matter of redistricting that this should be done by the legislature of the State in accordance with Article 1, Section 4, of the Constitution of the United States, which gives the legislature the power to fix the time and places, but reserves to the Congress the right at any time to make, alter, or amend such regulations. In 1911, in order to take care of a situation in Ohio and in some other States where they had the referendum, they changed this language that had been used for more than half a century to the language that it should be by the laws of the State.

Now, here is the practical situation under the law as it now stands. Unless my amendment is passed you would have this situation; after the enumeration is made it will probably develop in my State that instead of 43 Members of Congress we will have 42, and this means that if there is a deadlock between our legislature and our governor 42 Members of the Congress would have to

be elected at large. Every one of them could be nominated in the City of New York, and I am casting no reflection, but these men would not accurately reflect the sentiment of the rural section of the great State touching prohibition, immigration, and other important public questions.

Mr. Cooper of Wisconsin. Will the gentleman yield for a question?

Mr. Reed of New York. Yes.

Mr. Cooper of Wisconsin. As I heard the amendment read, it provides that the legislature may by concurrent resolution take this action at any time after the approval of this act.

Mr. Reed of New York. Yes; at any time after the approval of the act.

Mr. Cooper of Wisconsin. This bill is supposed to go into effect, or you desire it to go into effect during this special session, which would be before the census is taken. Therefore, this proposed amendment would provide that without the governor's signature the legislature could redistrict the State at any time after the signing of this bill and before the census has been reported.

Mr. Reed of New York. Something that should have been done nine years ago and has not been done. The legislature should have the right to do it now, if required to insure justice to the people of my State.

I now want to call your attention to the point of order, and I ask you gentlemen, if you have the bill before you, to turn to Section 21 of the bill. The point of order has been made that this proposed amendment is not germane and that it does not relate to the subject in any shape or form. Let us see what has happened. I think every one of you has an interest in this question.

Mr. Johnson of Texas. Mr. Chairman, a parliamen-

tary inquiry. Is the gentleman addressing his argument on the point of order to the House or to the Chairman of the committee?

The Chairman. Of course, it is being addressed to the Chair and the Chair is hearing the gentleman.

Mr. Johnson of Texas. It seemed to me the gentleman was making an argument to the House rather than to the Chair, and I did not think the House ought to pass on the question at this time.

The Chairman. The Chair is following the gentleman, both with respect to the present bill and the law to which the gentleman is referring.

Mr. Reed of New York. I realize that the point of order is well taken. I just hope the House will be patient with me. I do not think you need to feel any particular alarm about what may happen when I get through, but I just want to call your attention to a very important and practical question touching representation.

I want you to read the last sentence in Section 21:

> That the act entitled 'An Act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.

This was never intended to be in the present bill. This was in the Senate bill. They never changed it. Perhaps, under a strict construction by the courts they would not have to change it, but it leaves it open to considerable doubt, because the language is 'all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed,' and this includes Section 22.

It happens that if it is construed in this way it means

that Sections 3, 4, and 5 of the apportionment act of August 8, 1911, which provides as follows:

That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

Section 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in Sec. 3 of this act; and if there be no change in the number of Representatives from a State the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed—

Mr. Crowther. Will the gentleman yield?

Mr. Reed of New York. Yes.

Mr. Crowther. Does the gentleman from New York think that Sections 3 and 4 in the 1911 Act are really inconsistent with the present act?

Mr. Reed of New York. They are now the law and what I am pointing out to the House is that under Section 21 of this bill there is a possible construction by which they may be repealed, and we will go out to the country with an apportionment act that leaves it absolutely free to the legislature to put in shoestring dis-

tricts, saddlebacked districts and achieve all the vicious things of the gerrymanders in the days of old.

Mr. Crowther. Does not the language in the present bill call attention to the sections that are inconsistent, and I ask the gentleman again whether he considers Sections 3 and 4 inconsistent?

Mr. Reed of New York. I say there is that possible construction.

Mr. Crowther. Oh, possible construction!

Mr. Reed of New York. I will say this, that when we pass an act we should make it as clear as possible, and not leave anything to conjecture.

Mr. Bankhead. Mr. Chairman, a point of order. I do not desire to cut the gentleman from New York off, but he has conceded the point of order made by the gentleman from New York.

He is not discussing the point of order. He is not addressing the Chair. If he desires to be heard further, I think it should be by unanimous consent, because it is not in accordance with the provisions of the rules of the House.

The Chairman. The Chair thinks the point of order is well taken with this exception, that notwithstanding the concession of the point of order by the gentleman from New York that it may be well taken, he then proceeded to claim that the repeal of certain provisions of the prior law might make his amendment in order. The Chair is prepared to rule.

Mr. Reed of New York. I want to say that inasmuch as this bill may be passed repealing the provisions to which I have referred, my amendment proposes to save the situation by making it possible to prevent a deadlock in the legislature. I will yield to the gentleman from Idaho.

The Chairman. The Chair will be glad to hear from the gentleman from Idaho.

Mr. French. Mr. Chairman, I wish to address myself for a moment to the point of order. I have in mind the provision to which the gentleman from New York has referred, namely, the language of Section 21, but I take a different point of view as to the effect of the pending bill upon Sections 3, 4, and 5 of the act of 1911.

What does the pending bill provide? It provides, first, for taking the census; and, second, it provides for an apportionment of Representatives in Congress. The measure carries language, to which the gentleman from New York has referred in Section 21, providing for the repeal of certain specific laws and any other law inconsistent with the pending bill. Evidently the pending bill provides for the repeal of Section 1 of the Act of August 8, 1911. It unquestionably provides for such repeal. I do not think that it provides directly or indirectly for the repeal of other sections of the act.

Now, if that is true, it would seem that the remaining provisions of the Act of 1911 ought to be subject to amendment. That is precisely what is proposed by the amendment offered by the gentleman from New York.

The Act of August 8, 1911, provides for two contingencies in the districting of the different States. One is that in event the representation in the different States should not be disturbed by the census of 1910 and the State legislatures do not undertake to redistrict, then the act itself would provide that the districting in existence at the time of the passage of the act shall continue. The other contingency provided for was in States that would receive additional representation in Congress. The act provides that in such contingency if the States fail to redistrict the number of Representatives gained by

the States over that which they already had would be elected at large.

In the pending bill you are providing a third contingency not referred to in the Act of 1911, namely, the situation that would arise should some States suffer reduced representation. Should any State, as a result of the census and apportionment we are providing for, suffer a reduction in representation, then in the absence of laws in the States providing for new arrangements of districts there would be no provision whatever for election of Representatives in Congress from such States.

So, then, it would seem reasonable that the amendment offered by the gentleman from New York is in point and that it is germane to a portion of an act that we are not repealing, though we are repealing part of such act.

So, bringing the matter to a head, I submit that the pending bill provides for the repeal of Section 1 of the Act of August 8, 1911, as this section is in conflict with definite provisions of the pending bill, but it does not provide for the repeal of Sections 2, 3, 4 and 5. If that is true, it seems to me that the amendment of the gentleman from New York is germane."

Vol. 71—Part 3, Page 2445.

"The Chairman:

"• • • • However, the gentleman from New York (Mr. Reed) now claims that the provision in Section 21 is applicable, which reads as follows:

'That the act entitled 'An Act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.'

The gentleman from New York calls attention to that provision and claims that that relates to certain sections of the Act of August 8, 1911, which bore on the subject of redistricting by the States, but it seems to the Chair that the gentleman overlooked the effect of the words—'all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed.'

If there is nothing in this bill relating to redistricting, then there can be nothing in it which is inconsistent with the Act of 1911 on that subject. There can be no repeal by this bill of any law or parts of laws which are not inconsistent with that act on the subject of redistricting by State legislatures."

(Italics ours.)

APPENDIX L.

Minnesota Constitution.

Art. IV, Sec. 23. Census enumeration—apportionment. The legislature shall provide *by law* for an enumeration of the inhabitants of this State in the year one thousand eight hundred and sixty-five, *and every tenth year thereafter.* At their first session after each enumeration so made, and also at their first session after each enumeration made by the authority of the United States, the legislature shall have the power *to prescribe* the bounds of congressional, senatorial and representative districts, and to apportion anew the Senators and Representatives among the several districts *according to the provisions of Section Second of this article.*

Art. IV, Sec. 2. Apportionment of members. The number of members who compose the Senate and House of Representatives *shall be prescribed by law,* but the representation in the Senate shall never exceed one

member for every 5,000 inhabitants, and in the House of Representatives one member for every 2,000 inhabitants. The representation in both houses shall be apportioned *equally* throughout the different sections of the State, *in proportion to the population thereof*, exclusive of Indians not taxable *under the provisions of law.*

APPENDIX M.

The Legislative Power of the State of Minnesota.

Organic Act of Minnesota—An Act to establish the Territorial Government of Minnesota [passed March 3, 1849].

Sec. 4. And be it further enacted, That the legislative power and authority of said Territory shall be vested in the Governor and a legislative assembly. • • •

Sec. 6. And be it further enacted, That the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. • • •

Sec. 20. And be it further enacted, That *every bill* which shall or may pass the Council and House of Representatives, *shall, before it becomes a law,* be presented to the Governor of the Territory; if he approve, he shall sign it; but if not he shall return it, with his objections, to the house in which it originated; which shall cause the objections to be entered at large upon their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall also be reconsidered, and if approved by two-thirds of that house *it shall become a law;* • • • If any bill shall not

be returned by the Governor within three days (Sundays excepted) after it shall have been presented to him, the same *shall be a law* in like manner as if he had signed it, unless the legislative assembly, by adjournment, prevent it, in which case *it shall not become a law.*

MINNESOTA CONSTITUTION.

Art. 4, Sec. 11. *Every bill* which shall have passed the Senate and House of Representatives, in conformity to the rules of each House and the joint rules of the two houses, *shall, before it becomes a law, be presented to the Governor of the State.* If he approves, he shall sign and deposit it in the office of the Secretary of State for preservation, and notify the house where it originated of the fact. But if not, he shall return it, with his objections, to the house in which it shall have originated; when such objections shall be entered at large on the journal of the same, and the house shall proceed to reconsider the bill. If, after such reconsideration, two-thirds of the house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if it be approved by two-thirds of that house *it shall become a law.* * * * *If any bill shall not be returned* by the Governor within three days (Sundays excepted) after it shall have been presented to him, *the same shall be a law* in like manner as if he had signed it, unless the legislature, by adjournment within that time, prevents its return; in which case *it shall not be a law.* The Governor may approve, sign and file in the office of the Secretary of State, within three days after the adjournment of the legislature, any act passed during the last three days of the session, and the same *shall become a law.* * * *

Art. 4, Sec. 12. * * * *Every order, resolution or vote requiring the concurrence of the two houses* (except such as relate to the business or adjournment of the same) shall be presented to the Governor for his signature, and *before the same shall take effect,* shall be approved by him, or being returned by him with his objections, shall be repassed by two-thirds of the members of the two houses, *according to the rules and limitations prescribed in case of a bill.*

[*Note: The Act Authorizing the State Government Approved February 26, 1857, and the Constitutional Convention held July 13, 1857, and the adoption and ratification of the proposed Constitution of the State of Minnesota, October 13, 1857, and the Act of Admission into the Union, May 11, 1858, incorporated the provisions of the Organic Act into the present State Constitution.*

The Act of Admission recites the foregoing facts and states that the government adopted under the State Constitution is in form a Republican government.

Sec. 2 of the Act of Admission provides for two Representatives in the Federal Congress, and

Sec. 3 of the Act of Admission provides among other things that "all the laws of the United States which are not locally inapplicable shall have the same force and effect within that State as in other States of the Union."]

APPENDIX N.

State Legislative Districts.

The Organic Act of Minnesota [March 3, 1849].

Sec. 4. * * * And the persons thus elected to the legislative assembly shall meet at such place on such day as the governor shall appoint, but thereafter the

time, place and manner of holding and conducting *all elections by the people,* and the apportioning of the representation in the several counties or districts to the council and house of representatives, according to the population, *shall be prescribed by law,* as well as the day of the commencement of the regular session of the legislative assembly; provided, that no one session shall exceed the term of sixty days.

Act Authorizing a State Government [February 26, 1857].

Sec. 3. [Provides for representation in the State legislature "in all respects in conformity with the laws of said Territory regulating the election of representatives."]

Minnesota Constitution.

Art. 4, Sec. 23. [Set out as Appendix L, *supra.*]

Art. 4, Sec. 24.—Senatorial Districts—Terms of Office of Senators and Representatives.—The senators shall be chosen by single districts of convenient, contiguous territory, at the same time that the members of the house of representatives are required to be chosen, and in the same manner; * * * The terms of office of senators and representatives shall be the same as now prescribed by law * * *.

Art. 4, Sec. 2.—Apportionment of members [set out in Appendix L, *supra*].

APPENDIX O.

Congressional Districts.

Organic Act [March 3, 1849].

Sec. 14. And be it further enacted, That *a delegate of the House of Representatives of the United States*

to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, * * * The first election shall be held at such times and places and be conducted in such manner as the governor shall appoint and direct; and that *at all subsequent elections, the times, places and manner of holding the election shall be vrescribed by law.* * * *

Act of Admission into the Union [May 11, 1858].

Sec. 2. And be it further enacted, that said state shall be entitled to *two representatives in congress,* until the next apportionment of representatives among the several states.

Minnesota Constitution—

Art. 4, Sec. 23)

Art. 4, Sec. 2) [Set out in Appendix L, *supra.*]

APPENDIX P.

Minnesota Laws of 1931, Chap. 105.

Chap. 105, House File 852.—An Act to Amend Mason's Minnesota Statutes 1927, Section 651, relating to County Commissioner's Districts. Be It Enacted by the Legislature of the State of Minnesota:

Sec. 1. Boundaries of Commissioner District.—That Mason's Minnesota Statutes of 1927, Section 651, be amended to read as follows:

(651.) Each county shall be divided into as many districts, numbered consecutively, as it has members of the board. In all counties such districts shall be bounded by town, village, ward, or precinct lines, shall be composed of contiguous territory and contain as nearly as practicable an equal population. * * *

APPENDIX Q.

TABLE OF MINNESOTA DISTRICTING ACTS.

1849	Organic Act, Sec. 14	)
1858	Act of Admission into the Union, Sec. 2	) See Appendix O.
1858	Chap. 83	
1872	Chap. 21	
1881	Chap. 128	
1891	Chap. 3	
1901	Chap. 92	
1913	Chap. 513 [Mason's Minnesota Code 1927, Sections 13 to 23, inclusive].	
1929	Chap. 64 [Amending Chap. 513 as to the fifth and tenth districts only.]	
1931	House File 1456.	

APPENDIX R.

TABLE OF STATE REDISTRICTING METHOD.

State	*Method*	*Remarks*
Alabama	Statute	Question never raised.
Arizona		One Representative. Question never raised.
Arkansas	Statute	1901—Act 145 at p. 31, Crawford & Moses' Digest.
California	Statute	Section 117, Political Code. Chap. 181, Statutes of 1931. Question of the applicability of a referendum provision of State Constitution, §1, Art. 4 on the reapportionment of 1931 raised but petition for referendum failed to obtain proper number of signatures. Attorney General of California opposed to redistricting by any means other than statute.

State	*Method*	*Remarks*
Colorado	Statute	Question never raised.
Connecticut . . .	Statute	Question never raised.
Delaware		One Representative. Question never raised.
Florida	Statute	Compiled General Laws 1929, Art. 3.
Georgia	Statute	Question never raised.
Idaho	Statute	Question never raised.
Illinois	Statute	Question never raised.
Indiana	Statute	*State v. Bailey*, 16 Ind. 46; *May v. Rice*, 91 Ind. 546. Question never raised. 1891 bill passed over Governor's veto. 1895 bill passed over Governor's veto.
Iowa	Statute	Constitutional provision Art. 3, §37, against subdividing counties and forming congressional districts and against districts including non-adjoining counties.
Kansas	Statute	Question never raised.
Kentucky	Statute	Question never raised.
Louisiana	Statute	Question never raised. Act 160, p. 294, Laws of 1912.
Maine	Statute	Question never raised. Public Laws 1931, Chap. 245. Resolution requiring approval of Governor has the effect of law. Difference between resolution and other act is only on the question of number of readings before the Legislature.
Maryland	Statute	Code of Public Laws 1924, Art. 33, §163 of 172.
Massachusetts. .	Statute	Laws of 1931, Chap. 438.
Michigan	Statute	Question never raised.
Minnesota	Statute (up to 1931)	Statute vetoed 1931.
Mississippi . . .	Statute	Question never raised.
Missouri	Statute	Constitutional provision for referendum. Attorney General's opinion opposed to redistricting other than by law, including referendum provision.

State	*Method*	*Remarks*
Montana	Statute	Question never raised.
Nebraska	Statute	Question never raised.
Nevada	Statute	One Congressman.
New Hampshire	Statute	Question never raised.
New Jersey	Statute	Question never raised.
New York . . . . . (up to 1931)	Statute	Concurrent Resolution of Senate and Assembly of April 10, 1931.
New Mexico . . .	Statute	One Representative.
North Carolina.	Statute	Question never raised.
North Dakota . .	Statute	Question never raised.
Ohio	Statute	See *Davis v. Hildebrandt*, 241 U. S. 565; 103 Ohio Laws 567.
Oklahoma	Statute	Question never raised.
Oregon	Statute	Question never raised.
Pennsylvania . .	Statute	Act 361, approved June 27, 1931.
Rhode Island . .	Statute	Question never raised.
South Dakota . .	Statute	See *Schrader v. Polley*, 26 S. D. 5, 127 N. W. 848.
Tennessee	Statute	Question of joint resolution authorizing constitutional convention, but not involving districting, now pending.
Texas	Statute	Concurrent resolutions need executive approval, Art. 4, §15, Constitution of Texas.
Utah	Statute	Constitutional provision for districting, §1, Art. 9.
Vermont	Statute	Question never raised.
Virginia	Statute	Constitutional provision for districting by law. Section 55, State Constitution.
Washington . . .	Statute	Question never raised.
West Virginia . .	Statute	See *Re: Boyd Adkins*, 83 W. Va. 673. Joint resolution not effective as a statute.
Wisconsin	Statute	Legislative committee appointed to investigate proper procedure. Statute introduced in the Assembly and passed—Bill No. 998-a. Adjournment before further action.
Wyoming	. . . . .	One Representative.

APPENDIX S.

In the Circuit Court, September term, A. D. 1931. State of Illinois, ss., county of Boone. Frank T. Moran and G. E. Casper, complainants, v. William Bowley, County Clerk of Boone County, Ill., and William J. Stratton, Secretary of State of the State of Illinois, Defendants.

Findings by the Court.

The above entitled cause, a bill of complaint attacking the State congressional apportionment act passed by the legislature in 1931 and approved July 2, 1931, and praying a perpetual injunction against the defendants and each of them, restraining them from expending any more moneys derived from taxes in carrying out and enforcing said legislative act on the ground that said act is unconstitutional and void, coming on to be heard; and the complainants having twice amended said bill and the defendants having filed a general demurrer to the bill of complaint as amended, and said demurrer having been fully heard on the part of the defendants, argued by the attorney general of the State of Illinois and by Alexander J. Strom, State's attorney of Boone County, and on behalf of the complainants by Mr. Roy F. Hall, of Rockford, Ill.; and the court being fully advised in the premises;

It appears that the Legislature of Illinois did, in 1931, by a legislative act, sufficient in form, seek to divide the State of Illinois into 27 congressional districts for the election of Congressmen to represent the people of the State of Illinois and the respective districts in the lower House of Congress of the United States. The demurrer admits all facts well pleaded in the bill of complaint

and no exception has been taken to any language in the bill. Defendants contend that the bill will not lie, because it is an attempt by the judiciary to restrain executive, political, and administrative functions, citing *Fletcher v. Tuttle* (151 Illinois 41).

At the outset it is fitting to quote the language of Mr. Justice Cartwright in *The People v. Hutchinson* (172 Illinois 494):

> The duty of passing upon the constitutionality of an act of the legislature has always been regarded as a delicate one, to be entered upon with hesitation and caution, and to call for most deliberate and careful attention. The legislative and executive branches of the Government have necessarily construed the Constitution and determined that they may rightfully exercise the power assumed by the passage of the act, and their decision is entitled to the highest respect. In the consideration of the question involved the presumption is in favor of the constitutionality of the act, and it will only be set aside in case of a clear infringement of the Constitution.

Courts of equity have no power or jurisdiction to interfere with a political, legislative, or administrative function as such, but can deal only with property or civil rights. Unless a property right is involved, the bill must be dismissed. But the bill does not seek to enjoin or restrain a legislative, executive, or political function. It seeks to restrain the mismanagement and waste of public funds which are the property of the taxpayer, and is supported by a long line of decisions as old as the State. In *Fergus v. Russell* 270 Ill. 314; *Jones v. O'Connell*, 266 Ill. 447, and many other cases the rule is laid down:

"We have repeatedly held that taxpayers may resor to a court of equity to prevent the misapplication o public funds, and that this right is based upon the tax payers' equitable ownership of such funds and thei liability to replenish the public treasury for the defic ency which would be caused by the misappropriation," citing *Colton v. Hanchett,* 13 Ill. 615; *Perry v. Kinnear* 42 id. 160; *Chestnutwood v. Hood,* 68 id. 132; *Jackson v. Norris,* 72 id. 364; *McCord v. Pike,* 121 id. 288; *Littler v. Jayne,* 124 id. 123; *Stevens vs. St. Mary's Training School,* 144 id. 366; *City of Chicago v. Nichols,* 17 id. 97; *Adams v. Brenan,* 177 id. 194; *Burke v. Snively* 208 id. 328; *Jones v. O'Connell,* 266 id. 443.

The bill seeks to restrain the misapplication of pub lic funds in an illegal election under an act claimed to b unconstitutional. It is argued in this case, as it wa argued in *Fletcher v. Tuttle, supra,* that a primary an election of all State, district, and county officers must b held in 1932 in any event, and that the extra expense o holding a primary and election for Congressmen, na tional delegates, and electors would make no extr charge or expense, and therefore no public funds ar involved in this cause.

The vice of this argument is, that if Congressmen i Illinois should be elected under a void and unconstitu tional act the presumption is that they would be hel to be void and illegal officers, and the State would b called upon to hold a special election for their substi tutes who would be constitutionally elected at a larg expense to the State, which the taxpayers would b called upon to replenish to the public treasury, the legiti mate expenses for which have been wasted and lost b an election under a void act.

In *Fletcher v. Tuttle, supra,* there was no attempt made to prevent the waste or mismanagement of any fund, but the complainants sought only to protect his personal and political rights as a candidate for the legislature. The complainants in their bill, by allegations proper and sufficient, ground an equity upon the protection of the public funds.

It is averred in paragraph 14 of the bill, and admitted by the demurrer, that in the city of Chicago the congressional lines split wards and precincts, and the result is that in that city many of the precincts now formed are in two congressional districts. It can not be presumed that before the next election or at any time the proper governing authorities will remap the precincts so that each precinct will be wholly and entirely within a single congressional district. As the bill now stands the voters of many precincts will be deprived of the privilege of casting their vote for congressional officers. The law as enacted is not a complete, workable law. I know of no method by which the voters in one precinct could be separated and vote for separate congressional officers.

In *People v. Hutchinson* (172 Ill. 502), the Supreme Court in passing upon a senatorial apportionment act said:

> This act of May 1[illegible] 1893, is conceded to have been an unconstitutional and void act, which never became a law for the reason that it omitted the town of Riverside, a populous town in Cook County, which was not included in any of the senatorial districts and was deprived of representation.

Split precincts are equally deprived of representation.

But the main question in this case is whether the act as formed violates section 18 of article 2 of the consti-

tution of 1870, providing: "All elections shall be free and equal." This provision of the Constitution has been construed by the supreme court in *The People v. Emmerson*, 333 Ill. 611, as follows:

> This has been held by this court to mean that every qualified voter may freely exercise the right to cast his vote without restraint or coercion of any kind, and that his vote when cast shall have the same influence as that of any other voter. (*McAlpine v. Dimick*, 326 Ill. 240; *People v. Fox*, 294 id. 263; *Rouse v. Thompson, supra; People v. Election Comrs.*, 221 Ill. 9.)

In *McAlpine v. Dimick* (326 Ill. 249), the court said:

> Equal individual suffrage is the right of every American man or woman, is at the foundation of our scheme of government, and the free and equal exercise of that right, unhampered by any law by which the influence of the votes of any class of voters may be increased or decreased in relation to the votes of any other class, is essential to the preservation of the liberties of the people. A fraction of difference in the value of a vote may be small, but it can never be trivial, for when it is multiplied by a million it becomes a resistless force. The power to make a distinction between voters would itself be resistible. This same element of inequality of representation in a party convention was held fatal in the Fox case to the primary election law of 1919 and must have the same effect on the law of 1910.

This language has a deeper meaning than the use of the words at first blush would seem to indicate.

Cooley on Constitutional Limitations (5th Ed.), pages 44 and 45, sets out some of the principles to be established in the formation of a republican form of govern-

ment and what their constitutions should contain. He says:

> Certain things are to be looked for in all these instruments; though even as to these there is great variety, not only of substance but also in the minuteness of their provisions to meet particular cases.

He mentions some:

> 1. Those declaratory of the general principles of republican government, such as that all freemen when they form a social compact are equal, and no man or set of men is entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services; that absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority; * * * that all elections shall be free and equal; that representation shall be in proportion to population, etc.

With these principles of a republican form of government and the Constitution before me, a glance at the population of the various districts as formed by this legislative act is of interest. The population of the various districts is as follows:

First district	269,989
Second district	329,759
Third district	311,814
Fourth district	232,261
Fifth district	541,785
Sixth district	273,679
Seventh district	311,021
Eighth district	285,891
Ninth district	309,785
Tenth district	295,074

Eleventh district	322,319
Twelfth district	308,416
Thirteenth district	285,499
Fourteenth district	211,948
Fifteenth district	343,293
Sixteenth district	199,104
Seventeenth district	158,738
Eighteenth district	272,505
Nineteenth district	268,656
Twentieth district	299,384
Twenty-first district	261,408
Twenty-second district	213,154
Twenty-third district	276,521
Twenty-fourth district	301,605
Twenty-fifth district	280,854
Twenty-sixth district	227,827
Twenty-seventh district	308,365

An average population in a district should be something over 280,000. These districts are unequal in population, unreasonable, and unjust. For example, in the district where this court is sitting, the fifteenth, it is necessary for 2,116 voters to go to the polls and vote to equal the vote of one person in the seventeenth district.

The fifth district in Chicago contains a population of 541,785, more than 3.4 times the population of the seventeenth district with a population of 158,738. Just why the legislature should disfranchise over 260,000 persons in Chicago and deny them representation in Congress is not plain to be seen. It is shown by the bill that there are 22 districts which have more than one-half more inhabitants than the seventeenth district; there are 14 districts which have more than three-

fourths more inhabitants than the seventeenth district; that there are 10 districts which have more than 90 per cent more inhabitants than the seventeenth district; and that there are four of said districts which have more than double the inhabitants in the seventeenth district.

Our court in *The People v. Thompson*, 155 Ill. 484, has passed squarely on what constitutes an inequality of representation in citing a case in Wisconsin where one senate district contained 30,732 and another district contained 65,952, and also citing a Michigan case where one district contained 97,330 and another district contained only 39,727 population. The court said:

> It would seem plain that in the instances mentioned in the Wisconsin and Michigan cases there was no approximation toward equality in representation, for where one district contained in the one case more than twice and in the other nearly three times the population of another district, the legislature could not at all, in those instances at least, have regarded the injunction of the constitution to make the apportionment "according to the number of inhabitants."

I have no hesitation in holding under the allegations of the bill, which are admitted to be true, that the apportionment act in question violates the meaning and language of the Constitution; is subversive of the spirit and principles of a republican form of government and is unconstitutional and a void act.

The demurrer is overruled.

Defendants may have further time to plead.

The defendant and each of them state they do not desire to plead further, but elect to stand by their demurrer. Accordingly the defendants and each of them

are in default and a decree as prayed for in the bill may be entered against them.

APPENDIX T.

Supreme Court, Albany County. In the matter of the application of Samuel S. Koenig, John J. Knewitz, and William L. Ward for a mandamus order against Edward J. Flynn, Secretary of State of the State of New York. (Supreme Court, Albany County special term, October, 1931.)

Justice Ellis J. Staley, presiding.

Appearances: Abraham S. Gilbert, Esq., and Benjamin L. Fairchild, Esq., attorneys for petitioners; John J. Bennett, Esq., attorney general, attorney for respondent (Henry Epstein, Esq., of counsel). John Godfrey Saxe, Esq., attorney for James A. Farley, chairman of the Democratic State Committee, respondent-intervener (Robert F. Wagner and John J. O'Connor, Esq., of counsel).

MEMORANDUM.

Staley, J.: This application is made for a mandamus order directing the Secretary of State to certify in election notices that 45 Representatives in the House of Representatives in the Seventy-third Congress are to be elected in the congressional districts as defined in a concurrent resolution of the Senate and Assembly of the State of New York.

Section 4 of Article 1 of the Federal Constitution provides:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof;

but the Congress may at any time by law make or alter such regulations except as to the place of choosing Senators.

On Act of Congress approved June 18, 1929, provided for the fifteenth and subsequent decennial censuses and for an apportionment thereunder of Representatives in Congress among the several States. The effect of this census statute and the apportionment made thereunder was an increase in the number of Representatives of the State of New York in the House of Representatives from 43 to 45.

On April 10, 1931, the Assembly and Senate, composing the Legislature of the State of New York, passed a concurrent resolution subdividing the State into 45 congressional districts and therein specified and fixed the boundaries of such districts.

This resolution was not in the form of a bill or law. It was not submitted to the Governor of the State for his approval. Subsequent to its passage it was submitted for filing to the Secretary of State.

The Attorney General has rendered an opinion to the Secretary of State, advising him that such resolution is ineffective to accomplish a redistricting of the State into congressional districts, and for the purpose of this proceeding it is conceded that the Secretary of State will refuse to follow this resolution in his certificate for the election of 1932.

The substantial question involved is whether the Legislature of the State of New York has the power to divide the State into congressional districts by a concurrent resolution not submitted to the Governor of the State for his approval, or whether the Legislature was compelled to make such subdivision by an enactment of law subject to the approval of the Governor.

This question compels a consideration of the meaning of the term "legislature" as used in Section 4 of Article 1 of the Federal Constitution, of the existence of any enactment by Congress under its reserved power altering the constitutional regulation, and the extent of executive participation in the lawmaking power of the State of New York to validate legislative action therein.

> The legislative power of this State shall be vested in the Senate and Assembly. (New York Constitution, Art. 3, Sec. 1.)

Every bill which shall have passed the Senate and Assembly shall before it becomes a law be approved and signed by the Governor, or upon executive disapproval, approved upon reconsideration by two-thirds of the members elected to each house of the Legislature. Any bill not returned by the Governor within 10 days, unless return is prevented by adjournment, shall be a law in like manner as if he had signed it. (New York Constitution, Art. 4, Sec. 9.)

This latter section establishes the necessity of executive action of an affirmative or negative character to give the force and effect of law to enactments of the Legislature. It makes the Governor of the State an essential part of the lawmaking process and power, and establishes the extent of executive participation.

After the census of 1910, the Thirteenth Census, the Congress in accordance with its custom following every census, passed an act which apportioned the members of the House of Representatives among the several States. This act was approved August 11, 1911, and is referred to as the 1911 apportionment act. In addition to the numerical apportionment among the States of the Members of the House of Representatives, it contained provision for Representatives in certain terri-

tories upon their admission as States before apportionment under the next decennial census; it provided that the districts in each State entitled to more than one Representative shall be composed of a contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants; that in case of increase in the number of Representatives in any State, that such additional Representative shall be elected by the State at large, and the others from the existing districts, "until such State shall be redistricted in the manner provided by the laws thereunder," and if no change in number from the existing districts, "until such State shall be redistricted as herein prescribed."

The case of *Davis v. Hildebrandt* (241 U. S. 565) involved those provisions of the 1911 apportionment act in relation to provisions of the Constitution of the State of Ohio granting the right of referendum as a part of the legislative authority of that State. This case held that a redistricting act of Ohio for the purpose of congressional elections was properly submitted for validity to the referendum test, when such was duly invoked, because the enactment of Congress requiring that the redistricting should be made by a State, "in the manner provided by the laws thereof," compels such procedure.

Whatever the inference of this decision may be, it sustained the power of Congress to so deal with congressional elections. It did not define or establish the method of the exercise of the legislative power of that State to regulate congressional elections under the Federal Constitution in the absence of such congressional enactment, but accepted the act as sufficient justification for referendum submission.

Respondents herein contend that the Davis case is controlling here, for the reasons that the provisions of the 1911 apportionment act are still in effect; that they have not been repealed expressly or by implication and that their requirement "in the manner provided by law" is fatal to the method of action by the New York State Legislature reviewed in this proceeding.

With that contention I am constrained to disagree. The Act of 1911 was limited by its title to one for the apportionment of Representatives "under the Thirteenth Census." Its provisions are limited by express language to procedure required, "under this apportionment." It was a temporary enactment designed for a specific purpose which has been performed. Its life has expired. It has been superseded by the apportionment under the 1929 act. Its provisions limited by its language to the apportionment under the Thirteenth Census has no force or application to an apportionment under the Fifteenth Census.

The debates in Congress when the 1929 census and apportionment act was considered, in relation to a proposed amendment thereto, which are urged by the Attorney General as a valued guide to justify judicial determination that the general provisions of the 1911 act are still law, can not be accorded such force and effect. At best they are mere expressions of opinion of individual members that the general provisions of the 1911 act would still prevail after the enactment of the 1929 act, a view which was rejected. Such expressions are not to be accepted by the courts as controlling or competent aids to establish as law a statute which has ceased to exist under its own limitations.

The inclusion of the general provisions of the 1911 act in the Code of Laws of the United States adopted

in 1926 (Code of the Laws of the U. S., Title 2) does not affect a reenactment of those provisions.

Section 2 (a) of the Act of Congress under which the codification was made (Ch. 712, 44 Stat. 777) provides:

> but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments.

Hence, there exists no congressional regulation which alters the power of the legislature of each State to prescribe in a proper and legal manner the times, places, and manner for holding elections for Representatives in Congress.

The word "legislature" as used in Section 4, Article 1, and other sections of the Federal Constitution has been the subject of judicial construction by State and Federal courts.

In *Minnesota v. Holm* (Minnesota), a recent case, it was construed as meaning the representative body which makes the laws of the State, not synonymous with the lawmaking power of the State and not including constitutional participation by the Governor of that State. Upon this holding an act of the Legislature of Minnesota vetoed by the Governor providing for congressional redistricting was declared valid.

In *State v. Polley* (26 S. D. 5), it was given a contrary construction and there held to include the whole constitutional lawmaking power of the State and subject to the referendum vote of the people and not limited simply to the members who compose the legislature. It was

further held in this case that a State in its sovereign capacity possessed the power to regulate elections therein; that Section 4 of Article 1 of the Federal Constitution was not a grant but a recognition of that power subject, however, to the reservation of a power of Congress to establish regulations in relation to congressional elections and to that extent circumscribing the legislative authority.

In *Hawke v. Smith* (253 U. S. 221) the term "legislature" as used in Article V of the Federal Constitution in respect to the ratification of amendments to the Constitution was held to mean the deliberative representative bodies that make the laws of the people for the respective States, and that the ratification of a proposed amendment to the Federal Constitution by the legislature of a State is not an act of legislation but is the expression of the assent of the State to the proposed amendment.

The opinion of Mr. Justice Day, referring to the meaning of "legislature" as used by the framers of the Constitution in requiring "ratification" of amendments, says:

> That was not a term of uncertain meaning when incorporated in the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which makes the laws of the people. The term is often used in the Constitution with this evident meaning.

These expressions have been seized upon as justification for the exercise by legislatures of an independent power, unlimited by State constitutional requirements, to establish congressional districts in the State. The decision in this case and the expressions of the opinion

may be regarded as the prompting genesis of the concurrent resolution herein involved. At least they are asserted as authority for its validity.

It is significant that the opinion in this case in its reference to the portions of the Federal Constitution, where the term legislature is used with this evident meaning does not include Section 4 of Article I of the Constitution. That a view was entertained that a different meaning should be ascribed to the term as used in Section 4, Article I, is plainly indicated by reference in this opinion to the case of *Davis v. Hildebrandt*, in relation to which it said:

> Article I, Section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

The recognition of the difference in the method of functioning by the legislature where it exercises or did exercise the power of choosing a United States Senator, of ratifying or rejecting a proposed amendment to the Federal Constitution, of being bound by oath to support the Constitution of the United States and that of "prescribing" the districts in a State from which Representatives in Congress shall be elected, is, I believe, the key to correct interpretation. The nature of the function delegated to the legislature for performance affects and determines the methods of its action.

Legislative action has been frequently designated in judicial opinions as "legislative authority," "legislative power," and "the lawmaking power."

A clear distinction exists between action, which in

the very nature of things, must be taken by votes of the members of the legislature, and action taken by legislative authority. In the latter case there must be an exercise of the lawmaking powers and in this State the Governor, as well as members of the legislature, is an essential part of that power.

When the legislature is granted the power to prescribe, it means that the legislature will do so by the exercise of its legislative power and the exercise of that power to be effective must be in accord with all the lawmaking essentials.

In the State of New York, the Governor is an essential factor in the process. Judge Cardozo in the recent case of *Doyle v. Hofstader* (257 N. Y. 244), said:

> The legislature can initiate; but, without the action of the Governor, it is powerless to complete. It is not the sole custodian of legislative power. The power is divided between the legislature and the Governor.

Until this year the settled practice of all the States, so far as research has been able to determine, has been uniform in the method of establishing congressional districts by law enacted in the manner required by the lawmaking process of each State. Such action for nearly a century and a half furnishes a practical construction of the method of performing this function of persuasive, if not controlling and conclusive, weight. Common usage and practice indicating a particular interpretation of a constitution or statute is a great value in determining its real meaning.

> We do not readily overturn the settled practice of the years. (*Story v. Craig*, 231 N. Y. 33.)

> The framers of the Constitution employed words in their natural sense; and, where they are plain

> and clear, resort to collateral aids to interpretation is unnecessary and can not be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. * * * The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive. (*McPherson v. Blacker*, 146 U. S. 27, 36.)

Two views, completely divergent, of the meaning of the term legislature as used in Section 4, Article I, of the Federal Constitution are presented by the decisions of the Supreme Courts of South Dakota and Minnesota. Such a difference of view by high judicial authority opens the door for resort to the uniform practice which has prevailed since the Constitution was established as a guide and authority for decision.

The force of custom, practical construction, and usage should not at this late day yield to judicial interpretation of a term, declared in relation to the performance of a public function, which must, in the very nature of things, be performed by the individual choice and views of the members of the public body to which it is committed, when attempted to be applied to such body in the performance of a task which involves and reflects deliberate action by a State.

The construction of the requirement of the constitional provision in the method of congressional apportionment, as evidenced by the many laws of the States, so long practiced and acquiesced in, should not be upset and governmental processes thrown into confusion be-

cause the executive will not approve a congressional apportionment as enacted by the legislature or the legislature will not enact one which will receive the executive approval.

Order may be entered denying the application for mandamus order, without costs.

FILE COPY

FILED
MAR 12 193
CHARLES ELMORE CR
CLE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF MINNESOTA

AND

BRIEF IN SUPPORT THEREOF

SUPPLEMENTAL APPENDIX TO THE BRIEF

JOHN A. WEEKS,
736 Andrus Building,
ALFRED W. BOWEN,
1360 Rand Tower,
F. J. DONAHUE,
414 Hodgson Building,
W. YALE SMILEY, *pro se,*
910 McKnight Building,
Minneapolis, Minnesota,
Of Counsel.

GEORGE T. SIMPSON,
Counsel for Petitioner,
730 Security Building,
Minneapolis, Minnesota.

Court Printing Company, 322 So. 4th St., Minneapolis

Supreme Court of the United States

OCTOBER TERM, 1931

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, *Respondent.*

SUPPLEMENTAL APPENDIX TO BRIEF FOR PETITIONER

After the preparation and printing of the Petition for Writ of Certiorari herein, and too late to be included therein before filing, opinions were filed by the courts of last resort, of the states hereafter named, on which petitioner relies as supporting his contentions herein. These opinions are available to the court, as hereinafter tated. The opinion of the Court of Appeals of the state of New York not having been published, is printed in full.

APPENDIX U.

MISSOURI.

January 4, 1932.

State ex rel. John J. Carroll, et al., v. Hon. Charles U. Becker, Secretary of State of the State of Missouri.

45 S. W. (2nd) 533, published in advance sheets of the Southwestern Reporter for March 1st, 1932.

APPENDIX V.

Illinois.

January 13, 1932.

Frank T. Moran, et al., v. William Bowley as County Clerk of Boone County and William J. Stratton as Secretary of State of Illinois.

179 N. E. 526, published in advance sheets of the Northeastern Reporter for March 2nd, 1932.

APPENDIX W.

New York.

February 9, 1932.

In the Matter of the Application of Samuel S. Koenig, John J. Knewit and William L. Ward for a Mandamus Order, Peitioners-Appellants, against Edward J. Flynn, Secretary of State of the State of New York, Respondent, and James A. Farley, Chairman of the State Democratic Committee, Intervenor-Respondent.

Appeal from an order of the Appellate Division, Third Department, affirming an order of the Special Term denying an application for a mandamus order.

Abraham S. Gilbert and Benjamin L. Fairchild for the appellants,

John J. Bennett, Jr., Attorney General (Henry Epstein, First Assistant Attorney General, of counsel),

John Godfrey Saxe, for the intervenor.

Crane, J.

Following the census of 1910, Congress enacted the Thirteenth Apportionment Act, in August of 1911 (Vol. 37, U. S. Statutes at Large 13, Chap. 5). It reads in part as follows:

> "That after the third day of March, 1913, the House of Representatives shall be composed of four hundred and thirty-three members to be apportioned among the several states as follows: * * * New York, forty-three.
>
> "§3. That in each state entitled under this apportionment to more than one representative, the representatives to the sixty-third, and each subsequent, Congress, shall be elected by districts composed of a contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants. The said districts shall be equal to the number of representatives to which such state may be entitled in Congress, no district electing more than one representative.
>
> "§4. That in case of an increase in the number of representatives in any state under this apportionment, such additional representative or representatives shall be elected by the state at large and the other representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this act; and if there be no change in the number of representatives from a state, the representatives thereof shall be elected from the districts now prescribed by law until such state shall be redistricted as herein prescribed."

Thereafter, and in accordance with this act of Congress, New York State passed an act known as Chapter 890 of the Laws of 1911, which became a law on October 18, 1911, with the approval of the Governor. It read: "For the election of representatives the state shall be divided into forty-three districts, namely, * * *." The districts were then described, and it wound up by stating that all acts inconsistent with this law were repealed.

Thus the matter stood. Representatives were elected in this state from the Congressional Districts described in this state law of 1911, up to and until the present time. Another census was taken, pursuant to an act of Congress, passed June 18, 1929. This act not only provided for the taking of the census, but also provided for the increase or decrease in state representation according to the results of the census. The total number of representatives was not to be increased (46 U. S. Stat. at Large, Chap. 28, June 18, 1929). That part of the act providing for the apportionment of representatives is also to be found in *Mason's Code,* Vol. 5, No. 3, October 8, 1929 (p. 20). Section 22 (a) reads as follows:

> "On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each state, including Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of representatives to which each state would be entitled under an opportionment of the then existing number of representatives made in each of the following manners: (The rule is then stated) * * *.

"(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning representatives among the several states, then each state shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this act or subsequent statute, to the number of representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the clerk of the last House of Representatives forthwith to send to the executive of each state a certificate of the number of representatives to which such state is entitled under this section. * * *"

This much of the act of June 18, 1929, I have quoted, in order to show that it provided for the apportionment of four hundred and thirty-three representatives among the various states according to population as indicated by the census, but in no way indicated how the number of representatives allotted to each state should be chosen. The previous Apportionment Act of August 8, 1911, in Sections three and four, above quoted, made such a direction, but it is lacking in the later act of June 18, 1929. Upon the certificate of the President to Congress, followed by the certificate of the clerk of the House, all in accordance with the provisions of the census and Apportionment Act of June 18, 1929, New York became entitled to forty-five representatives instead of the forty-three apportioned to it under the act of 1911. This was an increase of two. How are the two to be elected?

The New York Legislature determined that it could be done by a joint resolution, and on April 10, 1931, divided the state into forty-five Congressional Districts

in this manner. The concurrent resolution not being a law was, of course, not submitted to the Governor for his approval, pursuant to the Constitution of this state. This method of electing congressmen is here challenged on two grounds: first, because the Legislature must redistrict the state by a duly enacted law, and not by resolution; and second, if this be not so, the act of Congress, August 8, 1911, is still in force and effect.

The Constitution of the United States, Article I, Section 4, provides: "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

By the Constitution of the state of New York, Article III, Section 1, the legislative power of the state is vested in the Senate and Assembly. The lawmaking power, however, includes control or supervision by the Governor in so far as it is provided by Article IV of the Constitution, Section 9, that:

> "Every bill which shall have passed the Senate and Assembly shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to

that house, it shall become a law notwithstanding the objections of the Governor."

When this government began to function under the Constitution adopted in 1787-1789, the then existing states apparently understood Section 4, Article I, of the Federal Constitution to refer to the law-making power of the Legislature or to such bodies as the individual states had created for the enactment of laws. The uninterrupted practice in all of the states has been to create Congressional Districts by laws enacted in accordance with the Constitution of the respective states, whatever that may be. While the plain and direct provisions of a Constitution cannot be modified or amended by practice, custom or violation, no matter how long continued, such uniformity by all the states in the method of electing Congressmen indicates quite clearly the meaning which was given to Section 4 of Article I, especially in the early days when the people were so sensitive to intrusion and control by individual executives. A uniform course of action involving the right to the exercise of an important power by the state government without question is no unsatisfactory evidence that the power is rightfully exercised. *Briscoe v. Bank of Kentucky* (36 U. S. 256); *McPherson v. Blacker* (146 U. S. 1, pp. 36, 37); *U. S. v. Sprague* (282 U. S. 716); *Wendell v. Lavin* (246 N. Y. 116); *People v. Tremaine* (252 N. Y. 27).

The wording of Section 4, Article I, very likely suggested that the action by the State Legislature under it should be in the form of a law. It was to be more than an assent by the people of the state to some federal proposition and more than a choice by them of a federal representative. The legislative act was to be a direction to the people of the state demanding cer-

tain things to be done, fixing a time, a place and a manner which had to be followed. From the Legislature was to come a mandate, the disobedience of which would result in penalties or legal consequences. Naturally, this would be effected in the same way as all other like mandates. The action of the Legislature would therefore be in the form of a law. Section 4 says that the times, places and manner shall be "prescribed" by the Legislature. "Prescribed" means to lay down authoritatively a rule of action. From time immemorial this has been done by a law according to the forms existing at the time. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Such a direction must take the form of law. Likewise, in Section 4, we find that Congress may exercise the power given to the State Legislature, and when it makes its regulations, it shall do so "by law." The matter being dealt with in Section 4 is the time, place and manner of holding elections for representatives. Whether these details be fixed by the Legislature of the state or by Congress, they are to be fixed by law. If Congress must do it by law, it is reasonable to suppose that the State Legislature was intended to do it the same way. This, at least, has been the interpretation given to this section for over one hundred and forty years, and it is too late now to overturn it.

There is a distinction to be drawn between the functions of a Legislature; such, for instance, as choosing Senators, making applications to the Federal Government for protection against invasion, ratifying a Constitutional amendment, consenting to a purchase of state lands—there is, I say, a difference between those functions of the Legislature and the prescribing or enacting

of a rule or direction, which must be followed and obeyed by the people of the state, called the law-making power; such, for instance, as dividing the state into Congressional Districts and directing the people where, when and how to vote. We find such a distinction referred to in *McPherson v. Blacker* (146 U. S. 1); *Davis v. Ohio* (241 U. S. 565); *Hawke v. Smith* (253 U. S. 221); *U. S. v. Sprague* (282 U. S. 716), alhough these cases did not pass upon the point here in question. See also *Matter of Doyle* (257 N. Y. 244). We conclude, therefore, that the resolution of April 10, 1931, was ineffective, and that its attempted redistricting of the state is null and void.

Even if this were not so, we would be inclined to hold that the act of Congress, August 6, 1911, was still in force and effect as a regulation to be followed in providing for the election of an additional number of representatives. Section 3 of that act certainly is a general provision which practically can apply to any increase or decrease in the number of representatives. Section 4, while in terms limited to the apportionment under the act of 1911, also provides and enacts a general rule which may be adapted to subsequent changes in the number of representatives, the rule being that additional representatives are to be elected at large and the others according to existing laws. This is simple, direct and universal. The act of June 18, 1929, did not touch these matters, made no reference whatever to the provisions enacted in Sections 3 and 4 of the Laws of 1911. The number of representatives in any given state were automatically readjusted upon the certificate of the President after each census. This was the only thing accomplished by the act of June 18, 1929. We do not

think that Congress intended to repeal the act of 1911 or thought that it would terminate upon the passage of the subsequent act. The two should be read together, if possible. One provided for the mehod of election and the other merely for the number of representatives. The two can be read together as a fair and reasonable regulation by Congress for the election of its representatives, and this is the view we shall take of it.

Even if we were to take a different view, however, our conclusion would be that by the act of 1911 and the similar acts that preceded it, there had been a practical recognition by Congress of the just and reasonable rule to be followed in the absence of a statute, and that this rule should be adhered to even if the statute does not govern *ex proprio vigore*.

With this expression of our opinion, we hold that the resolution of April 10, 1931, is without force; that forty-three of the forty-five Congressmen are to be elected according to the districts created by Chapter 890 of the Laws of 1911 of the State of New York, as amended, and the additional two will be elected at large by the entire state. This, of course, is in the absence of a law passed by the present Legislature now in session, redistricting the state into forty-five Congressional Districts. The order below is affirmed, without costs.

APPENDIX X.

There is also herewith submitted for the use of the court the following citations of authority supporting the propositions below stated:

1. Certain functions of state legislatures require the exercise of legislative powers:

John P. King M. Co. v. City Council of Augusta (1928), 277 U. S. 100; 48 Sup. Ct. 489 (490); 72 L. Ed. 801.

2. The ratification of amendments to the Federal Constitution calls for an exercise by the legislature of representative rather than legislative functions; such power is controlled, exclusively, by federal law and can not be varied by the states or the people thereof, or subjected to local referendum:

National Prohibition Cases (1920), 253 U. S. 350; 40 Sup. Ct. 486 (488); 64 L. Ed. 946.

Leser v. Garnett (1922), 258 U. S. 130; 42 Sup. Ct. 217 (218); 66 L. Ed. 505.

United States v. Sprague (1931), 282 U. S. 716; 51 Sup. Ct. 220 (222); 75 L. Ed. 640.

3. Political rights are protected by the Federal Constitution and laws, and in particular the right to vote for a federal officer is so protected; the abridgment or denial thereof, in any manner, is prohibited to the states, and a citizen of the United States may invoke the aid of the courts in asserting such rights:

Giles v. Harris (1903), 189 U. S. 475; 23 Sup. Ct. 639; 47 L. Ed. 909.

Wiley v. Sinkler (1900), 179 U. S. 58; 21 Sup. Ct. 17; 45 L. Ed. 84.

Ex Parte Yarborough (1884), 110 U. S. 651; 4 Sup. Ct. 152; 28 L. Ed. 274.

Baldwin v. Franks (1886), 120 U. S. 678; 7 Sup. Ct. 656 (763); 30 L. Ed. 766.

Logan v. The United States (1892), 144 U. S. 263; 12 Sup. Ct. 617 (625-626); 36 L. Ed. 429.

In Re Quarles (1895), 158 U. S. 532; 15 Sup. Ct. 959 (960); 39 L. Ed. 1080.

Ex Parte Young (1908), 209 U. S. 123; 28 Sup. Ct. 441 (447); 52 L. Ed. 714.

United States v. Mosely (1915), 238 U. S. 383; 35 Sup. Ct. 904 (908); 59 L. Ed. 355.

4. The states may, however require lawful conditions precedent, *e. g.*, registration of voters:

Mason v. Missouri (1900), 179 U. S. 328; 21 Sup. Ct. 125 (127); 45 L. Ed. 214.

Pope v. Williams (1904), 193 U. S. 621; 24 Sup. Ct. 573; 48 L. Ed. 817.

5. The equal protection and due process clauses of the 14th Amendment prohibit arbitrary classification or discrimination which abridge or deny any of the rights, privileges or immunities conferred or protected by the Federal Constitution and laws:

Cases cited under paragraph 3, *supra*.

Meyer v. Nebraska (1923), 262 U. S. 390 (400); 42 Sup. Ct. 625; 67 L. Ed. 1042.

Smith v. Cahoon (1931), 283 U. S. 553 (556-7); 51 Sup. Ct. 582; 75 L. Ed. 1264.

Foster Fountain Pen Co. v. Haydel (1928), 278 U. S. 1 (13); 49 Sup. Ct. 1; 73 L. Ed. 147.

Liggett Co. v. Baldridge (1928), 278 U. S. 105 (111); 49 Sup. Ct. 57; 73 L. Ed. 204.

Frost v. Corporation Commission (1929), 278 U. S. 515 (525); 49 Sup. Ct. 235; 73 L. Ed. 483.

Quaker City Cab Co. v. Mars (1928), 277 U. S. 389; 48 Sup. Ct. 553 (554); 72 L. Ed. 927.

6. The jurisdiction of the Supreme Court to review the decisions of the state courts; the question, whether or not, a federal question was raised below, and whether the decision below was properly based on a non-federal question, are all questions for the determination of the Supreme Court. The decision below does not preclude the Supreme Court from reviewing a case, and determining the questions thus presented, on the basis of the effect and operation of the law or act challenged, regardless of the determination of the state legislature, or the decision of the state court.

Kansas City So. Ry. Co. v. Albers Comm'n Co. (1912), 223 U. S. 575 (591-593); 32 Sup. Ct. 316; 56 L. Ed. 556.

Creswill v. Knights of Pythias (1912), 225 U. S. 246 (261); 32 Sup. Ct. 822; 56 L. Ed. 1074.

Davis v. Wechsler (1923), 263 U. S. 22 (24); 44 Sup. Ct. 13; 68 L. Ed. 143.

Ancient Egyptian Order v. Michaux (1929), 279 U. S. 737 (745); 49 Sup. Ct. 485; 73 L. Ed. 931.

Furnam v. Nicol (1869), 75 U. S. (8 Wall.) 44 (56); 19 L. Ed. 370.

Nutt v. Knut (1906), 200 U. S. 13; 26 Sup. Ct. 216; 50 L. Ed. 348.

St. Louis I. M. & S. Ry. Co. v. Starbird (1917), 243 U. S. 592 (598-9); 37 Sup. Ct. 462; 61 L. Ed. 917.

Truax v. Corriodan (1921), 257 U. S. 312 (324); 42 Sup. Ct. 124; 66 L. Ed. 254.

Standard Oil Co. v. Graves (1919), 249 U. S. 389 (394); 39 Sup. Ct. 320; 63 L. Ed. 662.

Amer. Ry. Ex. Co. v. Levee (1923), 263 U. S. 19 (21); 44 Sup. Ct. 11; 68 L. Ed. 140.

First Nat'l Bank v. Anderson (1926), 269 U. S. 341; 46 Sup. Ct. 135; 72 L. Ed. 95.

Stearns v. Minnesota (1900), 179 U. S. 223 (232); 21 Sup. Ct. 73; 45 L. Ed. 162.

Adams v. Russell (1913), 229 U. S. 353 (359); 33 Sup. Ct. 846; 57 L. Ed. 1224.

U. S. Glue Co. v. Town of Oak Creek (1918), 247 U. S. 321; 38 Sup. Ct. 499 (501); 62 L. Ed. 1135.

American Mfg. Co. v. City of St. Louis (1919), 250 U. S. 459 (462-3); 39 Sup. Ct. 522; 63 L. Ed. 1084.

Shaffer v. Carter (1920), 252 U. S. 37 (55); 40 Sup. Ct. 221; 64 L. Ed. 445.

Meyer v. Nebraska (1923), 262 U. S. 390 (400); 42 Sup. Ct. 625; 67 L. Ed. 1042.

Appleby v. City of New York (1926), 271 U. S. 364 (380); 46 Sup. Ct. 569; 70 L. Ed. 992.

Hanover Fire Ins. Co. v. Carr (1926), 272 U. S. 494 (511-12); 47 Sup. Ct. 179; 71 L. Ed. 372.

First Nat'l Bank v. City of Hartford (1927), 273 U. S. 548 (552-3); 47 Sup. Ct. 462; 71 L. Ed. 767.

7. The question of practical construction, that contemporaneous construction by the framers of the Constitution, and long acquiescence therein by Congress, and administrative officers, fixes the meaning of constitutional provisons:

Myers v. The United States (1926), 272 U. S. 52 (116); 47 Sup. Ct. 21; 71 L. Ed. 160.

colonial and historical background, see:

45 Harvard L. Rev. (Dec. 1931) 155

FILE COPY

FILED
JAN 22 19
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF SAID WRIT.

HENRY N. BENSON,
Attorney General of Minnesota,
102 State Capitol,
St. Paul, Minnesota,
Counsel for Respondent.

WILLIAM H. GURNEE,
Assistant Attorney General
of the State of Minnesota,
102 State Capitol,
St. Paul, Minnesota,
Of Counsel for Respondent.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX

Index

Facts 1
The issue stated 3
Summary of Argument 3
Argument:
1. Each state is the judge of what constitutes its legislature ... 4
2. There was not drawn in question the validity of a statute of the United States 10
3. No statute of Minnesota was claimed to be repugnant to the constitution and/or laws of the United States 12
4. No violation of the fourteenth amendment 14
5. Questions are political rather than judicial 17
6. Decision of the court below conclusive 21
Conclusion 24

INDEX OF DECISIONS AND AUTHORITIES

	Page
Anthony vs. Burrow, 129 Fed. 783	22
Barlotti vs. Lyons, 182 Cal. 575	5
Brooks vs. Fischer, 79 Cal. 173	5
Browne vs. Union Pacific Railroad Company, 267 U. S. 255	11
Carstairs vs. Cochran, 193 U. S. 10	13
Chapin vs. Fye, 179 U. S. 127	11
Chicago, Indianapolis & Louisville Railway Company vs. Hackett, 228 U. S. 559	11
Congressional Record, Vol. 71, Part 3, page 2445	6
Cuyahoga River Power Company vs. Northern Realty Company et al., 244 U. S. 300	11
Decher vs. Secretary of State, 209 Mich. 565	5
Donovan vs. Suffolk County, etc., 225 Mass. 55, 2 A. L. R. 1334	17
Election Contest, 1 Bartlett 47-55	8
Election Contest of Phelps and Cavanaugh, 1 Bartlett 248	8
Erie Railroad Company vs. Solomon, 237 U. S. 427	11
Ex parte Dillon, 262 Fed. 563	5
First National Bank of Garnett vs. Ayers, 160 U. S. 660	13
Hawke vs. Smith, 253 U. S. 221	5
Hixon vs. Oakes, 265 U. S. 254	11
Hughes Federal Procedure, Vol. 5, § 3242	24
In re Baird, 142 N. Y. 523	17
In re Opinion of the Justices, 118 Me. 544	5
King vs. West Virginia, 216 U. S. 92	23
Lindsley vs. Natural Carbonic Gas Company, 220 U. S. 61	13
McCrary on Elections, 4th Ed., §§ 191, 192	8
McPherson vs. Blacker, 146 U. S. 1	9, 15
Merchants & Manufacturers National Bank vs. Pennsylvania, 167 U. S. 461	23
Minor vs. Happersett, 21 Wall. 162	14
Montana vs. Rice, 204 U. S. 291	13, 23
Moore vs. City of Georgetown, 127 Ky. 409, 105 S. W. 905, 32 Ky. Law Rep. 323	19
People ex rel. Carter vs. Rice. 135 N. Y. 473	17
People ex rel. Woodyatt vs. Thompson, 155 Ill. 451	17
Pope vs. Williams, 193 U. S. 621	15
Price vs. Illinois, 238 U. S. 446	13
Quong Ham Wah Company vs. Industrial Commission, 255 U. S. 445	13
Ragland vs. Anderson, 125 Ky. 141, 100 S. W. 865, 30 Ky. Law Rep. 1199	19
Richardson vs. McChesney, 128 Ky. 363, 108 S. W. 322, 129 A. S. R. 299	17
Scudder vs. Comptroller of New York, 175 U. S. 32	10
Smith vs. Jennings, 206 U. S. 276	23

State ex rel. Engelhard vs. Weber, 96 Minn. 422 14
State ex rel. Meighen vs. Weatherill, 125 Minn. 336 17
State ex rel. Smiley vs. Holm, 184 Minn. ..., 238 N. W. 494 2
State ex rel. Smiley vs. Holm, 184 Minn. ..., 238 N. W. 792 3
State ex rel. Warson vs. Howell, 92 Wash. 540 17
State of Ohio on relation of Davis vs. Hildebrant, 241 U. S. 565 ..7, 22
Terrace vs. Thompson, 263 U. S. 197, affirming 274 Fed. 841 13
United States vs. Anthony, 11 Blatchf. (U. S.) 200 15
United States vs. Cruikshank, 92 U. S. 542 15
United States vs. Reese, 92 U. S. 214 15
Wise vs. Bigger, 79 Va. 269 17

INDEX OF CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States:
Article I, section 4 ..... 4, 6, 12, 20
Article I, section 5 ..... 4, 20
Article II, section 1 ..... 9, 16
Fourteenth amendment, section 1 14
Constitution of Minnesota:
Article 4, section 1 4
Article 4, section 11 ..... 8, 12
Article 4, section 23 ..... 8, 12, 13
Statutes:
37 St. L., c. 5 10
46 St. L., c. 28 ..... 1, 10

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF SAID WRIT.

Respondent opposes the granting of the petition for a writ of certiorari as prayed for by petitioner upon the ground that no federal question is involved.

FACTS.

Following the taking of the 1930 census and by virtue of 46 St. L., c. 28, adopted June 18, 1929, Minnesota became entitled to nine representatives in the congress of the United States (folio 3). It had previously had ten such representatives. The two houses of the legislature of the state, by

a majority vote (ff. 4-6), adopted House File 1456 (ff. 4, 5), dividing the state into nine congressional districts. After such passage the bill was presented to the governor who returned it to the house of representatives with his reasons for refusing to approve (ff. 6, 7). On the day following its return the house of representatives adopted a resolution directing that the enrolled copy of the bill be deposited with the secretary of state and remain a part of the permanent records in that office (f. 8). H. F. 1456 was deposited as directed and now reposes in the office of the secretary of state, and appears in the 1931 session laws at page 640.

Conceiving that his rights as a citizen, elector and taxpayer residing in the fourth ward of the city of Minneapolis, in the county of Hennepin, in the state of Minnesota, had been infringed, petitioner brought this action in the district court of Ramsey county against the secretary of state praying that the court "declare invalid any and all filings for the nomination to the office of representative in congress in the state of Minnesota designating a subdivision of the said state as a congressional district; enjoin said secretary of state from receiving any filings for the office of representative in congress in the state of Minnesota which designate a subdivision of said state as a congressional district; and enjoin said secretary of state from giving any notice of the holding of elections for the office of representative in congress in the state of Minnesota designating a subdivision of said state as a congressional district, and for such other, further and different relief as to the court may seem just and proper" (f. 14).

A general demurrer to the petition was sustained by the trial judge (ff. 14, 15). Petitioner appealed from this order to the state supreme court (f. 15). The order of the district court was affirmed (ff. 38-60). *State ex rel. Smiley*

vs. Holm, 184 Minn....., 238 N. W. 494. Upon remittitur to the district court, judgment was entered dismissing petitioner's action upon the merits (f. 16). Timely appeal from this judgment was taken (f. 17) and the judgment affirmed by the supreme court of Minnesota, its court of highest resort (f. 17) and judgment to that effect entered November 17, 1931 (f. 18). *State ex rel. Smiley vs. Holm,* 184 Minn....., 238 N. W. 792. This is the judgment which petitioner seeks to bring up for review.

THE ISSUE.

The sole point at issue here is whether the action of the legislature of Minnesota in redistricting the state for congressional purposes by H. F. 1456 offends against the constitution and/or statutes of the United States.

SUMMARY OF ARGUMENT.

1. Each State Is the Judge of What Constitutes Its Legislature.
2. The Validity of No Statute of the United States Was Drawn in Question.
3. No Statute of Minnesota Was Drawn in Question on the Ground of Its Being Repugnant to the Constitution, Treaties or Laws of the United States.
4. No Privilege or Immunity Was Properly Claimed by Petitioner under the Constitution or Statutes of the United States, Nor Was He Denied Equal Protection of the Laws.
5. Whether H. F. 1456 Is Invalid Because the Districts Created Therein Are Not Compact and Composed of Contiguous Territory and Because of Inequalities in

Population Is a Political and Legislative Rather Than a Judicial Question.

6. That House File 1456 Is a Valid Determination by the Legislature Has Been Foreclosed by the Decision of the Court Below.

ARGUMENT.

1. Each State Is the Judge of What Constitutes Its Legislature.

Article I, section 4, of the federal constitution, reads in part as follows:

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing senators."

Article I, section 5, of the same instrument, contains this provision:

> "Each house shall be the judge of the elections, returns and qualifications of its own members. * * *"

Article 4, section 1, of the constitution of Minnesota, provides, among other things that

> "The legislature shall consist of the senate and house of representatives, which shall meet biennially at the seat of government of the state, at such time as shall be prescribed by law. * * *"

Article 4, section 23, of the state constitution, provides that

> "* * * at their first session after each enumeration made by the authority of the United States, the legislature

shall have the power to prescribe the bounds of congressional, senatorial and representative districts and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article."

The constitution of the United States thus gives authority to the legislature of each state to "prescribe" the times, places and manner of holding elections for representatives in congress. What constitutes the legislature of a state? The federal constitution does not require that a state legislature shall consist of two representative bodies, nor, indeed, that it be constituted in any particular or peculiar way. Generally, legislatures are the law-making body of a state, representative of the people.

Hawke vs. Smith, 253 U. S. 221.
Brooks vs. Fischer, 79 Cal. 173.
Barlotti vs. Lyons, 182 Cal. 575.
Decher vs. Secretary of State, 209 Mich. 565.
Ex parte Dillon, 262 Fed. 563.
In re Opinion of the Justices, 118 Me. 544.

We take it that the people of Minnesota or of any other state might by appropriate constitutional amendment provide for the election or even the appointment of a single body of men authorized to make laws, subject to executive veto or not, as deemed best. The legislature of a state might conceivably be a small board, commission or committee. The governor might or might not have a veto power over the actions of such a legislature. What constitutes the legislature of a state is peculiarly a matter for the people of that state. When a question arises as to whether or not the "legislature" of a state has acted in accordance with the constitution or laws of that state, the judgment

of the highest court of that state is conclusive on the question.

The people of Minnesota have said that the "legislature shall consist of the senate and house of representatives." The highest court of Minnesota has said that when acting in the matter of prescribing congressional districts, the legislature consists of these two representative bodies and that the governor has no control over the determination of these two houses.

Is not this sufficient? Wherein does the constitution of the United States require that such action be subject to the veto power of the chief executive of the state?

It has been said that at the time of the adoption of the federal constitution only three states, namely, Massachusetts, New Hampshire and New York had seen fit to grant the veto power to their governors. (See Congressional Record, Vol. 71, Part 3, page 2445.) It cannot be contended, therefore, with any force, that the framers of the constitution had in mind that the actions of the state legislatures in prescribing congressional districts, must be approved by the chief executives of the states.

It is respondent's position:

(a) That article I, section 4, of the federal constitution, grants to the "legislature" of each state the power to prescribe the times, places and manner of holding elections for representatives in congress, subject to the right of congress to alter such regulations.

(b) That it is for each state to determine what constitutes its legislature for this purpose.

If this is true, then no federal question is involved because the federal government is not concerned with the manner in which a state legislature is constituted.

In *State of Ohio on Relation of Davis vs. Hildebrandt*, 241 U. S. 565 (567), in speaking of the power of referendum as reserved to the people by the constitution of Ohio, this court said:

> "Without going into the many irrelevant points which are pressed in the argument and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States referred to.
>
> "1. As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the State had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit."

This court affirmed the judgment of the state court, saying (page 570):

> "It is apparent from these reasons that there must either be a dismissal for want of jurisdiction because there is no power to reexamine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied."

Since this court held in the case cited that the decision

of the court below foreclosed the matter so far as the state power was concerned, we think it follows that in the case at bar this court is foreclosed by the decision of the supreme court of Minnesota as to what constitutes the legislature of that state when acting in the matter of dividing the state into congressional districts.

Congress has provided that Minnesota shall have nine representatives in the house of representatives in congress. Whether they shall be elected by districts or at large is a matter for Minnesota to decide. Congress, in accordance with precedent, will seat the duly elected representatives of this state no matter which plan is adopted in this state.

McCrary on Elections, 4th Ed., §§191, 192.

Election Contest, 1 Bartlett 47-55.

Election Contest of Phelps and Cavanaugh, 1 Bartlett 248.

It is well recognized that, in theory at least, a representative in congress represents the entire state from which he comes and not a particular district.

It is true that the state constitution, article 4, section 11, provides that

> "Every bill which shall have passed the senate and house of representatives in conformity to the rules of each house and the joint rules of the two houses shall, before it becomes a law, be presented to the governer of the state. If he approves he shall sign and deposit it in the office of the secretary of state for preservation and notify the house where it originated of the fact. But if not, he shall return it, with his objections, to the house in which it shall have originated; when such objections shall be entered at large on the journal of the same and the house shall proceed to reconsider the

bill. If, after such reconsideration, two-thirds of that house shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if it be approved by two-thirds of that house, it shall become a law. * * *"

The court below held that in districting the state the legislature was acting, not strictly in the discharge of legislative duties as a law-making body acting in a sovereign capacity, but more as an agent of the federal government (f. 47). It also held that in Minnesota, at least, under the state constitution, the governor possessed no veto power over the action of the state legislature when performing this federal function. Specifically, the court said (f. 47):

"The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs."

It may be that in other states, under different state constitutions, or under state constitutions differently construed, the governor has such veto power. If it is the will of the people of the state, as interpreted by the highest court of that state, that the governor's approval is not necessary to give potency to such a regulation of the legislature, all well and good. The question is one for each state to determine for itself. The framers of the federal constitution went only so far as to impose this duty upon the legislatures of the several states. The matter of determining who make up the legislature of a particular state was left to the people of that state.

In *McPherson vs. Blacker*, 146 U. S. 1 (25), this court held that under the second clause of section I, article 2, of the federal constitution the legislature possesses a plenary

authority to direct the manner of appointing presidential electors and that the whole subject is committed to the state legislatures. This court said (page 27):

> "The State also acts individually through its electoral college, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.
>
> "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

It therefore follows that H. F. 1456, being a valid action of the legislature of Minnesota, as determined by its supreme court, is not repugnant to either the constitution or statutes of the United States.

2. There Was Not Drawn in Question the Validity of a Statute of the United States.

Two federal statutes were discussed and involved to some extent in this proceeding, viz.: 37 St. L., c. 5, being the reapportionment act of 1911, and 46 St. L., c. 28, being the census and reapportionment act of 1929.

In order that certiorari will lie to review a judgment of a state court of highest resort on the ground that there was drawn in question the validity of a statute of the United States it must affirmatively appear that the federal question was raised in the state court before final decision.

Scudder vs. Comptroller of New York, 175 U. S. 32.

Chapin vs. Fye, 179 U. S. 127.

Chicago, Indianapolis & Louisville Railway Company vs. Hackett, 228 U. S. 559.

The question must be substantial,

Hixon vs. Oakes, 265 U. S. 254,

and not frivolous,

Erie Railroad Company vs. Solomon, 237 U. S. 427.

Where the decision of the state court rests upon two grounds, and the ground independent of the federal question is sufficient to sustain it, the United States Supreme Court will not take jurisdiction.

Cuyahoga River Power Company vs. Northern Realty Company, et al., 244 U. S. 300.

Browne vs. Union Pacific Railroad Company, 267 U. S. 255.

The lower court in the case at bar did not pass on the validity of the federal statute cited. It held that the 1911 apportionment act of congress had expired by its own terms —that it affected only the actions of state legislatures in dividing their respective states into congressional districts under the apportionment of representatives in congress made by the 1911 act—that the 1911 act was so limited by its own language and so replaced by subsequent law that it was no longer upon the scene (ff. 42, 43, 52). The 1911 act was not held to be invalid. The holding of the state court was that by its own terms the 1911 act ceased to be of efficacy when the 1929 census and apportionment act was approved and became a law.

This was not tantamount to drawing in question the validity of the 1911 act.

The 1929 act was not questioned at all. Both parties

agreed that it was a valid act of congress. In this state of the record respondent urges that the validity of federal statutes was not drawn in question by this proceeding and that this court should not take jurisdiction upon that ground.

3. No Statute of Minnesota Was Claimed to Be Repugnant to the Constitution and/or Laws of the United States.

H. F. 1456 was not a statute of the state of Minnesota. No one claimed it was a statute. For the petitioner it was asserted that H. F. 1456 was not a valid enactment of the legislature because not approved by the governor or passed over his veto (f. 12). The state constitution, article 4, section 11, was relied upon by the petitioner. The supreme court of Minnesota construed this section of the state constitution and also article 4, section 23, and held that under this section the approval of the governor was not necessary to make effective a determination of the state legislature forming congressional districts.

Petitioner's attack was upon the validity of H. F. 1456 as a statute of the state.

If the state constitution had contained no provision giving the governor a power of veto, undeniably he would have obtained no such right by virtue of either the federal constitution or any subsisting federal statute.

If the constitution of Minnesota provided for a lawmaking body or legislature consisting, for example, of three men appointed by the governor or elected at large without any right of veto on the part of the governor, would not congress accept the determination of such a body as final? Is it not a question for each state as to what constitutes its legislature in carrying out the mandate contained in article I,

section 4 of the federal constitution?

The constitution of Minnesota contains an explicit direction to the legislature in article 4, section 23, to the effect that following each federal census enumeration "the legislature shall have the power to *prescribe* the bounds of congressional * * * districts." The supreme court of Minnesota has said: "The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs" (f. 47). We believe such construction is binding upon this court.

The question of whether or not a state statute conflicts with the constitution of a state is settled by the decision of its highest court.

Carstairs vs. Cochran, 193 U. S. 10.

Quong Ham Wah Company vs. Industrial Commission, 255 U. S. 445.

Terrace vs. Thompson, 263 U. S. 197, affirming 274 Fed. 841.

The validity of a state statute under the state constitution will not be inquired into by the supreme court of the United States. Such inquiry involves questions of local law only and the decision of the supreme court of a state is controlling.

First National Bank of Garnett vs. Ayers, 160 U. S. 660.

Lindsley vs. Natural Carbonic Gas Company, 220 U. S. 61.

Price vs. Illinois, 238 U. S. 446.

Montana vs. Rice, 204 U. S. 291.

That incidentally the state court expressed the opinion that the word "legislature" as used in article I, section 4 of the federal constitution means the two houses of the legislature only does not create a federal question. Such deter-

mination was not necessary to the decision below. Since it was not necessary and the decision in respect to the state matters involved was all that was required, this court should not take jurisdiction.

Petitioner's objections to H. F. 1456 were not that its substance was invalid because in conflict with the federal constitution or statutes. *His objections were to the manner in which the legislature acted.* This is shown by reference to the petition filed in the state district court (ff. 5-8, 12).

Whether a state legislature acts in accordance with the constitution of that state is a state and not a federal question.

4. IT IS APPARENT THAT NO PRIVILEGE OR IMMUNITY OF THE PETITIONER UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES IS INFRINGED AND THAT HE IS NOT DENIED "EQUAL PROTECTION OF THE LAWS."

Petitioner invokes the fourteenth amendment to the federal constitution, because of inequalities in the population of the nine congressional districts. It is asserted that the voters in the districts containing the larger populations are in some manner discriminated against and deprived of some right guaranteed by the federal constitution.

The fourteenth amendment in section 1 deals with privileges and immunities of citizens of the United States and the right of suffrage is not one of them.

This amendment does not add to the privileges and immunities of citizens.

Minor vs. Happersett, 21 Wall. 162.

State ex rel. Engelhard vs. Weber, 96 Minn. 422.

The right of voting is a privilege arising under the constitution of the state and not under the constitution of the

United States. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the state where he offers to exercise it and not because of citizenship of the United States.

Pope vs. Williams, 193 U. S. 621 (632).
United States vs. Anthony, 11 Blatchf. (U. S.) 200.

In *McPherson vs. Blacker,* 146 U. S. 1, this court had under consideration a statute of the state of Michigan providing for the election of presidential electors by districts, *i. e.,* the voter in a particular district voted for one presidential elector only and not for all the electors running on a general ticket. Article 2, section 1 of the federal constitution provides:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

The plaintiffs sought to have this act declared void because of conflict with the fourteenth amendment.

In holding that the fourteenth amendment could not properly be invoked (page 38) the court said:

> "The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been." Citing *U. S. vs. Cruikshank,* 92 U. S. 542; *United States vs. Reese,* 92 U. S. 214.

On page 38 of the McPherson decision the court further said:

> "The first section of the fourteenth amendment does not refer to the exercise of the elective franchise,"

and again on page 40:

> "If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has a right to vote the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second clause of section 1 of Article II has been divested and the State has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect."

In short, this court held that since it was within the power of each state to appoint in such manner as the legislature thereof might direct the number of electors to which it was entitled, there was no infringement of the right of any citizen of Michigan because he was permitted to vote for one elector only. Each citizen had the same right as any other citizen in this respect. In Minnesota, under H. F. 1456, each citizen has the same right as any other citizen to vote for one representative in congress from his district. Because there may be fewer voters in one than in another congressional district does not infringe any immunity or right of the petitioner herein guaranteed to him by the constitution. Every citizen of Minnesota is equally affected by H. F. 1456. Each may vote for one candidate for congress in the district in which he resides.

Clearly the fourteenth amendment may not be successfully invoked in this case.

5. CONSIDERATIONS OF POPULATION AND COMPACTNESS OF THE SEVERAL DISTRICTS ARE POLITICAL RATHER THAN JUDICIAL QUESTIONS.

The dividing of territory into legislative districts is a legislative function. It is a matter which in the very nature of things requires the exercise of discretion. Such discretion is to be exercised by the legislative body empowered to create these districts and not by the courts. The rule appears to be well established that the courts will interfere only when such discretion is plainly and grossly abused.

State ex rel. Meighen vs. Weatherill, 125 Minn. 336.
Donovan vs. Suffolk County, etc., 225 Mass. 55, 2 A. L. R. 1334.
People ex rel. Carter vs. Rice, 135 N. Y. 473.
People ex rel. Woodyatt vs. Thompson, 155 Ill. 451.
In re Baird, 142 N. Y. 523.
State ex rel. Warson vs. Howell, 92 Wash. 540.
Wise vs. Bigger, 79 Va. 269.

In the last cited case the general assembly of the state of Virginia divided the state into congressional districts. On the question of inequality of population, on page 282 of the opinion, the court used this language:

> "The laying off and defining of the congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people, whose representatives they are."

In *Richardson vs. McChesney,* 128 Ky. 363, 108 S. W. 322, 129 A. S. R. 299, the supreme court of Kentucky squarely ruled that legislative division of the state into congressional districts cannot be judicially reviewed in the absence of a constitutional provision controlling apportionment. It was

also pointed out that the constitution of the United States contains no direction to the states in the matter of division into congressional districts and that there was nothing in the state constitution referring to this matter. Suit was brought to declare invalid acts of 1890 and 1898, respectively, dividing the state of Kentucky into congressional districts. Kentucky was entitled to eleven congressmen and had a population of 1,648,690, making the exact proportion of population of each district 149,881. In the opinion a table is set forth showing that the eleven districts contained populations ranging from 114,024 to 188,124. In its decision the supreme court of Kentucky said:

> "There is no mention of congressional districts in the Constitution of the state; nor is there in that instrument any direction to the General Assembly as to how the districts shall be laid off. In the matter of dividing the state into congressional districts the legislature, at least so far as the power and authority of this court extends, is supreme. This court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the legislature has absolute control. Except when limited by the Constitution of the state, the General Assembly, especially in administrative and political affairs, is beyond the reach of the judiciary of the state. We have no authority to pass judgment upon its acts. * * * If, in the matter of dividing the state into congressional districts, this court should undertake to declare invalid the division made by the legislative department, it would simply result in setting up our judgment against the judgment of the members elected for the purpose of performing this duty. We would be putting up our opinion against

those in whom the exclusive right to regulate this matter had been lodged, and be arrogating to ourselves wisdom, honesty and fairness superior to those charged by law with the control of these matters. *Moore vs. City of Georgetown*, 127 Ky. 409, 105 S. W. 905, 32 Ky. Law Rep. 323. When the Legislature has exceeded its legitimate powers by enacting laws in conflict with the Constitution or that are prohibited by it, we have not hesitated to interpose the veto power lodged in the judiciary for the purpose of preserving the integrity of the organic law under which all departments of the state government were created and live, and to which all of them owe obedience. And so, when the General Assembly in the division of the state into senatorial and legislative districts grossly violated that provision of the Constitution directing that the districts should be 'as nearly equal in population as may be,' we exercised the power vested in the judiciary to protect from invasion by whatever source the fundamental law of the state, and declared the act invalid. *Ragland vs. Anderson*, 125 Ky. 141, 100 S. W. 865, 30 Ky. Law Rep. 1199. But in the matter of congressional districts we find nothing in our State Constitution to guide us. There is nowhere any limitation upon the power of the Legislature, and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency, or propriety of laws enacted by the General Assembly, unless they conflict with the Constitution.

* * * * * * * * *

"Nor do we find in the Constitution of the United

States any direction to the states upon this subject. The only provisions in that instrument relating to it are these: Section 4, Art. I, provides: 'The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators.' And the Fourteenth Amendment provides: 'Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.' It will thus be seen that the Constitution of the United States has left matters relating to congressional districts to the disposition of the states. Nor has the Congress of the United States undertaken to legislate upon the subject except to provide 'that the number of Congressmen to which each state may be entitled in Congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants.' The said districts shall be equal to the number of representatives to which such state may be entitled in Congress, no one district electing more than one representative.' What right, if any, Congress has to control or supervise the action of state legislatures in the division of the states into congressional districts, we need express no opinion in the absence of a judicial determination by the Supreme Court of the United States of the power of Congress to control the states in this matter."

Under Article I, section 5 of the constitution of the United States each house in congress is the judge of the elections

returns and qualifications of its own members. If congress is of the opinion that the 1911 Act is still in force and has been ignored by the Minnesota legislature it may refuse to seat the congressmen elected from this state. The state of Minnesota is satisfied, and the supreme court of that state has held that inequalities of various congressional districts are not such as to call for judicial interference. This is a matter primarily for Minnesota, acting through its legislature. So long as nine representatives in congress are fairly elected and present themselves for service in the national house of representatives with proper credentials it is not a matter of any particular consequence to the rest of the United States as to precisely how many constituents each congressman has. Each congressman represents the entire state from which he is elected and congress has always seated persons even though elected on a ticket at large rather than by districts as required by existing federal statutes.

See Election Contest Cases, cited under Point 1.

6. THAT H. F. 1456 IS A VALID DETERMINATION BY THE LEGISLATURE HAS BEEN FORECLOSED BY THE DECISION OF THE SUPREME COURT OF MINNESOTA.

As previously pointed out, the main object of petitioner's action in the state court was to have H. F. 1456 declared invalid because not adopted in accordance with the requirements of the state constitution. Petitioner's contentions were determined to be unsound by the supreme court of Minnesota. This seems to foreclose further inquiry. The petitioner has no right guaranteed to him by the federal constitution or federal statutes that actions of a state legislature shall follow any particular procedure. The matter of procedure is for the people of each state. The federal

constitution delegates to the legislature of each state a right to act in prescribing the times, places and manner of electing representatives in congress. Whether the legislature shall prescribe these regulations by statute, joint resolution or otherwise, whether the regulations shall be subject to veto power or referendum is left to the determination of each state.

State of Ohio on relation of Davis vs. Hildebrant, 241 U. S. 565.

In *Anthony vs. Burrow,* 129 Fed. 783 (787), it was said that:

"The power to determine the number of representatives in congress and to apportion that number among the several states resides in and can be exercised only by the congress of the United States. In the exercise of that power the reapportionment act from which the above quotation is made was enacted, fixing the number of representatives in congress from the state of Kansas at eight, and providing for their election. But the power to divide the territory of a state into congressional districts, for the purpose of selecting members of congress apportioned to a state is a power residing in the legislature of the state, and not in the congress of the United States, as is recognized by said act of congress. In the exercise of that power the act of the legislature of 1897 was passed, taking the county of Pottawatomie from, and adding the county of Shawnee to, the first congressional district. Hence it is apparent that the right of Shawnee county to participate in the proceedings of the Holton convention, under the averments of complainant's bill does not depend upon the true construction of the 'reapportionment

act of congress, but does depend upon the validity of the act of the legislature of the state placing the county of Shawnee in the first congressional district; and the validity or invalidity of that act of the legislature is a question for the determination of the courts of the state, and does not involve a federal question for determination by this court, unless the further contention made by solicitors for complainant may be sustained."

The court held that the federal district court sitting in equity had no jurisdiction to grant an order requiring a state officer to certify the nomination of a certain person as a candidate for representative in congress or from restraining the proper officers of the state acting under a state statute from issuing a certificate of nomination to a candidate for representative in congress upon the ground that the court had no jurisdiction.

Petitioner's action in the court below was based upon the theory that H. F. 1456 was not a valid act of the legislature because the legislature did not proceed in accordance with the state constitution.

The authorities are squarely to the effect that the proceedings of a state legislature in the enactment of a law do not give rise to a federal question, but that the determination of the state court that a state law has been validly enacted is final.

Smith vs. Jennings, 206 U. S. 276.

Merchants & Manufacturers National Bank vs. Pennsylvania, 167 U. S. 461.

Montana vs. Rice, 204 U. S. 291.

King vs. West Virginia, 216 U. S. 92.

"The question whether or not a state statute conflicts with the constitution of the state does not present any

question for review by the supreme court of the United States * * *."

Vol. 5, *Hughes Federal Procedure*, § 3242.

While the authority to create congressional districts comes from the federal constitution, it is vested in state agencies, to-wit: the legislatures, and it is for the courts of the several states to say what constitutes the legislatures and whether or not the acts of such legislatures are valid. Assuming for the sake of argument, that the federal constitution permits such legislation, it is then for congress to say whether the governor shall be a part of the federal machinery in the redistricting matter. Until congress does so act, the question is left to the state legislatures and it is for the state courts to decide the legal question here at issue.

CONCLUSION.

It is respectfully submitted that this case was correctly decided below and that no federal question is presented invoking the reviewing power of this court.

Respectfully submitted,

HENRY N. BENSON,
Attorney General of Minnesota,
Counsel for Respondent.

WILLIAM H. GURNEE,
Assistant Attorney General of Minnesota,
Of Counsel for Respondent.

FILE COPY

MAR

IN THE

Supreme Court of the United States

October Term, 1931.

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA,

Respondent.

BRIEF OF RESPONDENT.

HENRY N. BENSON,
Attorney General of Minnesota,

WILLIAM H. GURNEE,
Asst. Attorney General of Minnesota,
Counsel for Respondent,
St. Paul, Minnesota.

SUBJECT INDEX.

	Page.
Decision to be reviewed	1
Statement of the facts	2
Statement of respondent's points	4
History of congressional reapportionment	4
History of congressional redistricting by the legislature of Minnesota	14
ARGUMENT:	
Point I, commences	15
The term "legislature" as used in Article I, section 4 of the federal constitution means the bi-cameral body described in Article 4, section 1 of the state constitution	15
Meaning of word "legislature" as used in Article I, section 4	20
South Dakota cases considered (State ex rel. Schrader v. Polley, 26 S. D. 5)	33
Powers of state as distinguished from those of legislature	34
Doctrine of practical construction	36
The Missouri case (State ex rel. Carroll v. Becker)	38
The Illinois case (Moran et al. v. Bowley), decided January 13, 1932	38
The New York case (Application of Koenig v. Flynn) decided February 9, 1932	39
Point II, commences	40
1911 act is no longer in force	40
Davis v. Hildebrant, 241 U. S. 565 discussed	44

Point III, commences 47
The Minnesota act does not violate the federal act of August 8, 1911, commences 47
Effect of including parts of 1911 act in United States Code 50
Inequalities in population not sufficient to invalidate act 51
Reasons for not making provision for election of congressmen at large in the 1929 law 61
Point IV, commences 63
No violation of the fourteenth amendment 63
Conclusion 66

INDEX OF DECISIONS AND AUTHORITIES.

Page.
Baldwin v. Trowbridge, 3 Bartlett on Contested Elections, p. 46 31
Baird, in Re, 142 N. Y. 523 ..... 27, 31, 54
Barlotti v. Lyons, 182 Cal. 575 47
1 Bartlett on Contested Elections 47-53 7
1 Bartlett on Contested Elections 248 7
3 Bartlett on Contested Elections 46 27
Brooks v. Fischer, 79 Cal. 173 47
Carroll v. Becker (Missouri case; not yet reported) 38
Carstairs v. Cochran, 193 U. S. 10 48
Carter, People ex rel., v. Rice, 135 N. Y. 473 53
Clark, Ex parte, 100 U. S. 399 7
Congressional Globe, 1st Session, 39th Congress, p. 815. 31
Congressional Record, Vol. 47, pp. 3436, 3437, 3507.... 46
Congressional Record, Vol. 71, Part 3, p. 2447 5

Congressional Record, Vol. 71, Part 3, p. 2481 59
Congressional Record, Vol. 71, Part 3, p. 2484 60
Congressional Record, Vol. 71, Part 2, p. 1609 10
Congressional Record, Vol. 71, Part 2, p. 2277 59
Cooley on Constitutional Limitations, 6th Ed., p. 85 ... 36
12 Corpus Juris, p. 709 26
Davis v. Hildebrant, 241 U. S. 565 ..... 10, 38, 39, 44, 46, 49, 65
Decher v. Secretary of State, 209 Mich. 565 47
Dodge v. Woolsey, 18 How. 331, 348 21
Donovan v. Suffolk County, 225 Mass. 55, 2 A.L.R. 1334 53
Ex Parte Clark, 100 U. S. 399 7
Ex Parte Siebold, 100 U. S. 371 7
First National Bank of Garnett v. Ayers, 160 U. S. 660. 48
Hawke v. Smith, 253 U. S. 221 ..... 20, 30, 47
Hollingsworth v. Virginia, 3 Dall. 378 23
Hughes Fed. Procedure, Vol. V, § 3242 66
In the matter of the application of Koenig et al., v. Flynn (New York case, not yet reported) 39
In re Baird, 142 N. Y. 523 54
In re Opinion of the Justices, 118 Maine 544 47
King v. West Virginia, 216 U. S. 92 66
Koenig et al. v. Flynn (New York case, not yet reported) 39
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 48
Los Angeles v. Los Angeles City Water Co., 177 U. S. 558 37
Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677 37
McCrary on Elections (4th Ed.), sections 191, 192 7
McCulloch v. Maryland, 4 Wheat. 316, 402 20
McPherson v. Blacker, 146 U. S. 1 ..... 18, 64

Meighen v. Weatherill, 125 Minn. 336 53
Mer. & Manf. Bank v. Pennsylvania, 167 U. S. 461 66
Minor v. Happersett, 21 Wall 162 63
Montana v. Rice, 204 U. S. 291 ..... 48, 66
Moran v. Bowley (Illinois case, not yet reported) 38
Nixon v. Herndon, 273 U. S. 536 64
Phelps and Cavanaugh, 1 Bartlett on Contested Elections 248 7
People v. Tremaine, 252 N. Y. 27 37
People ex rel. Carter v. Rice, 135 N. Y. 473 53
People ex rel. Woodyatt v. Thompson, 155 Ill. 451 54
Pope v. Williams, 193 U. S. 621 63
Price v. Illinois, 238 U. S. 446 48
Quong Ham Wah Company v. Industrial Commission, 255 U. S. 445 48
Richardson v. McChesney, 128 Ky. 363, 108 S. W. 322, 129 A. S. R. 299 57
Schrader v. Polley, 26 S. D. 5 33
Siebold, Ex Parte, 100 U. S. 371 7
Smiley, State ex rel., v. Holm, 184 Minn. 228, 238 N. W. 494 ..... 1, 3, 16, 25, 26, 36, 46
Smiley, State ex rel., v. Holm 184 Minn. 647, 238 N. W. 792 ..... 1, 3
Smith v. Jennings, 206 U. S. 276 65
State ex rel. Carroll v. Becker (Missouri case, not yet reported) 38
State ex rel. Meighen v. Weatherill, 125 Minn. 336 53
State ex rel. Schrader v. Polley, 26 S. D. 5 33
State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494 ..... 1, 3, 16, 25, 26, 36, 46
State ex rel. Smiley v. Holm, 184 Minn. 647, 238 N. W. 792 ..... 1, 3

State ex rel. University v. Chase, 175 Minn. 259 36
State ex rel. Warson v. Howell, 92 Wash. 540 56
State of Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565 ..... 10, 38, 39, 44, 46, 49, 65
Swafford v. Templeton, 185 U. S. 487 65
Terrace v. Thompson, 263 U. S. 197 48
University v. Chase, 175 Minn. 259 36
United States v. Anthony, 11 Blatchf. 200 64
United States v. Cruikshank, 92 U. S. 542 64
United States v. Reese, 92 U. S. 214 64
United States v. Sprague, 282 U. S. 716 36
Warson v. Howell, 92 Wash. 540 56
Wendell v. Lavin, 246 N. Y. 116 37
Wise v. Bigger, 79 Virginia 269 56
Woodyatt, People ex rel. v. Thompson, 155 Ill. 451 54

INDEX OF CONSTITUTIONAL PROVISIONS AND STATUTES.

Pages.

Constitution of the United States:

Article I, section 2 ..... 5, 21, 22, 64
Article I, section 2, paragraph 1 ..... 17, 24
Article I, section 3 21
Article I, section 3, paragraph 1 ..... 17, 24
Article I, section 3, paragraph 2 ..... 17, 24
Article I, section 4 ..... 5, 15, 18, 19, 20, 24, 27, 28, 30, 32, 33, 35, 39, 44, 46, 48, 51, 52, 65, 66
Article I, section 7 23
Article I, section 8 22
Article I, section 8, paragraph 16 35

Article I, section 8, paragraph 17 ..... 17, 24, 34
Article I, section 9 34
Article II, section 1, paragraph 2 18
Article IV 22
Article IV, section 3 22
Article IV, section 3, paragraph 1 17
Article IV, section 4 17
Article V 17, 20, 28, 34, 35
Article VI 22
Article VI, paragraph 3 18
Article VII 29
Eleventh amendment 23
Fourteenth amendment, section 1 63
Fourteenth amendment, section 2 ..... 4, 41
Seventeenth amendment, paragraph 1 18
Seventeenth amendment, paragraph 2 ..... 18, 19
Eighteenth amendment 35

Constitution of Illinois:
Article II, section 18 39

Constitution of Minnesota:
Article 1, section 4 15
Article 4, section 1 ..... 15, 16
Article 4, section 11 16
Article 4, section 23 ..... 25, 26

Constitution of Virginia:
Article 5, section 13 56

Laws and Statutes.

Minnesota Laws:
General Laws 1901, page 97, chapter 92 42
General Laws 1913, page 743, chapter 513 42

General Laws 1919, page 756 14
Special Session Laws 1912, page 56 14
Special Session Laws 1919, page 105 15

Minnesota Statutes:

General Statutes 1923, section 24 42
Mason's Minnesota Statutes of 1927, section 24 42

United States Statutes:

1 Stat. L. 253 5
2 " " 128 5
2 " " 669 6
3 " " 651 6
4 " " 516 6
5 " " 491 6
9 " " 432 ..... 8, 13, 40
10 " " 25 8
12 " " 353 8
17 " " 28 8
22 " " 5 8
26 " " 735 9
31 " " 733 9
37 " " 13, c. 5 ..... 4, 9, 10, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 51, 62, 66, 67
46 " " c. 28 ..... 2, 11
U. S. Title II, sec. 4 42
U. S. Code of 1926, Title II, sections 2, 3, 4, 5 50
Mason's U. S. C. 1926, page 1 50

IN THE

Supreme Court of the United States

October Term, 1931.

No. 617.

W. YALE SMILEY,

Petitioner,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA,

Respondent.

BRIEF OF RESPONDENT.

DECISION TO BE REVIEWED.

This proceeding brings up for review a judgment of the Supreme Court of Minnesota, to-wit, State ex rel. Smiley vs. Holm, 184 Minn. 647, 238 N. W. 792. The reasoning of the court below is stated in the decision of the same court on appeal from an order sustaining a demurrer to the petition, to-wit, State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494.

THE FACTS.

Following the taking of the 1930 census, and by virtue of 46 Stat. L., c. 28, adopted June 18, 1929, the State of Minnesota became entitled to nine representatives in the Congress of the United States (Record, p. 3). It had previously had ten such representatives (p. 2). The two houses of the legislature of the state, by a majority vote adopted house file 1456 (pp. 4-6), dividing the state into nine congressional districts. After such adoption the bill was presented to the governor, who returned it to the house of representatives, where it originated, with the reasons for his refusing to approve it (pp. 6 and 7). On the day following its return to the house of representatives, that body adopted a resolution directing that the enrolled copy of the bill be deposited with the secretary of state and remain a part of the permanent records in that office (p. 7). House File 1456 was deposited as directed and now reposes in the office of the secretary of state and was printed with the laws adopted at the 1931 session of the legislature at page 640.

Conceiving that his rights as a citizen, elector and taxpayer, residing in the fourth ward of the City of Minneapolis, Hennepin County, Minnesota, had been infringed upon, petitioner brought an action in the district court of Ramsey county against the secretary of state, praying that the court "declare invalid any and all filings for the nomination to the office of representative in congress in the State of Minnesota designating a subdivision of the said state as a congressional district; enjoin said secretary of state from receiving any filings for the office of representative in congress in the State of Minnesota which designate a subdivision of said state as a congressional district; and enjoin said secretary of state from giving any notice of the holding of elections for the office of representative

in congress in the State of Minnesota designating a subdivision of said state as a congressional district, and for such other, further and different relief as to the court may seem just and proper" (p. 12).

A general demurrer to the petition was sustained by the trial judge (p. 13). Petitioner appealed from this order to the state supreme court (p. 14). The order of the district court was affirmed (pp. 44-63): State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494. Upon remand to the district court, judgment was entered dismissing petitioner's action upon the merits (pp. 14-15). Timely appeal from this judgment was taken (p. 15) and the judgment was affirmed by the supreme court of Minnesota, its court of last resort, and judgment of affirmance entered in that court on November 17, 1931 (p. 16); State ex rel. Smiley v. Holm, 184 Minn. 647, 238 N. W. 792.

ARGUMENT.

POINTS.

I.

House File 1456 is valid notwithstanding its veto by the Governor.

II.

The Act of Congress of August 8, 1911 (37 Stat. L. 13, Ch. 5), is no longer in effect.

III.

House File 1456 does not violate the Act of August 8, 1911 (37 Stat. L. 13, Ch. 5).

IV.

There is no Violation of the Fourteenth Amendment.

HISTORY OF CONGRESSIONAL REAPPORTIONMENT.

As bearing upon the issues involved in this case, it may help to consider briefly the various apportionment acts passed by the Congress.

Art. I, sec. 2, of the Constitution of the United States, provides for the enumeration of all persons within the United States to be made within three years after the first meeting of the Congress, and within every subsequent term of ten years, in such manner as the Congress shall by law direct.

Section 2 of the Fourteenth Amendment provides in part that:

> "Representatives shall be apportioned among the several states according to their respective numbers, counting

the whole number of persons in each state, excluding Indians not taxed."

Article I, section 4, of the federal constitution, in the first paragraph thereof provides:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

In article I, section 2, the number of representatives in Congress to which each state then forming a part of the union should be entitled is specified.

For a history of apportionment legislation and an able discussion of the power of congress to delegate authority to the legislatures of the states to redistrict for congressional purposes, the attention of the court is directed to a brief prepared by Hon. Marion E. Rhodes, representative in congress from Missouri, found in the congressional record, vol. 71, part 3, beginning at page 2447.

Following the decennial census of 1790, taken pursuant to the constitutional mandate contained in article I, section 2, of the constitution, congress passed its first apportionment act—1 Statutes at Large 253, effective April 14, 1792. The act provides for one representative from each state for every 33,000 persons. There is no reference to congressional districts, and presumably the members of congress were elected at large.

Following the census of 1800, congress passed a second apportionment act in substantially the same language as the act of 1792, and providing for one representative for each 33,000 persons (2 Stat. L. 128).

After the census of 1810, the third apportionment act was passed. The only difference between this act and the two preceding it was that the ratio was changed to one member of congress for every 35,000 persons (2 Stat. L. 669).

Following the 1820 census, the fourth apportionment act was enacted substantially the same as those preceding, except that the basis of representation was fixed at one representative for every 40,000 persons. No reference was made to congressional districts (3 Stat. L. 651).

After the census of 1830 the fifth apportionment act was passed increasing the basis of representation to one member for every 47,700 persons, there still being no reference therein to congressional districts (4 Stat. L. 516).

Following the 1840 census, by act of congress effective June 25, 1842 (5 Stat. L. 491), the sixth apportionment act became a law, fixing the ratio at one representative for every 70,680 persons in each state having a fraction greater than one moiety of the said ratio. Section 2 of the law provides that:

> "In every case where a state is entitled to more than one representative, the number to which each state shall be entitled under this apportionment shall be elected by districts composed of contiguous territory equal in number to the number of representatives to which such state may be entitled, no one district electing more than one representative."

This is the first time that congress required representatives in the house of representatives to be elected by congressional districts. Apparently, members of congress had previously been elected at large, or elected by districts determined by the several state legislatures independently of congressional action.

It may not be out of place to digress briefly at this point and show what attitude was taken by congress in respect to

its own enactment requiring representatives to be elected by districts.

Following the enactment of the apportionment act of 1842, congressional elections were held and in several states, notwithstanding the positive provisions of section 2 of that act, representatives in congress were elected at large. Contests were instituted and the majority of the committee on elections held the second section above quoted to be unconstitutional and void. This view was ably supported in a lengthy report submitted by Hon. Stephen A. Douglas of Illinois: McCrary on Elections (4th ed.), secs. 191, 192. The members of congress elected at large were therefore seated in spite of section 2 of the 1842 act. The report of the committee may be found in 1 Bartlett on Contested Elections, 47-55. This ruling was followed in the later case of Phelps & Cavanaugh, 1 Bartlett on Contested Elections, 248, which arose at the time the first representatives in congress were sent from Minnesota.

So far as we have been able to ascertain, congress has never receded from this position, and we find no case in which members of that body duly elected at large rather than by districts have not been seated. McCrary, in his work on Elections, criticizes the holding of congress in these two cases and points to decisions of this court in Ex Parte Siebold, 100 U. S. 371, and Ex Parte Clark, 100 U. S. 399, as indicating that congress may lawfully require the election of representatives in congress by districts.

In 1850 provision was made for taking the seventh decennial census, and in the census act congress authorized the secretary of the interior to apportion representatives among the several states and fixed the number of members at 233. This act provided for electing one representative at large for each major portion of the ratio. This is the first time that congress

provided for taking the census and determining the apportionment in the same act. The secretary of the interior was not only directed to apportion representatives in congress among the several states, but he was directed to certify the results of his apportionment to the house of representatives and to the governors of the several states (9 Stat. L. 432). The act provided a method for permanently apportioning members of congress after each subsequent decennial census. In this respect it resembles the 1929 act. Congress supplemented this act by 10 Stat. L. 25, giving the secretary of the interior further directions and authority and increasing the membership of the house of representatives to 234.

Following the census of 1860, the number of members of the house of representatives was fixed at 241, and additional members were assigned to certain states. The act is silent as to the matter of congressional districts (12 Stat. L. 353).

Ten years later the number of representatives in the house was fixed at 283, to be elected by districts composed of contiguous territory and containing, as nearly as practicable, an equal number of inhabitants. Provision was also made for electing members at large in states in which an increased number of representatives had been given by law, and providing that the other representatives to which any state might be entitled should be elected by the districts then provided for until the legislature of said state might otherwise provide (17 Stat. L. 28). The act applies only to representatives elected under the apportionment then made.

The act of February 25, 1882 (22 Stat. L. 5) fixes the number of members of the house at 325, apportions them among the states and makes no reference to the ratio of representation. Section 3 of the act provides that members shall be elected by districts composed of contiguous territory and which

contain, as nearly as practicable, an equal number of inhabitants. The provisions of the act are limited to the election of congressmen thereunder. There was also a provision, similar to that contained in the act of 1872, for the election of members at large in case of an increase in the number of representatives of a state.

In 1891 (by 26 Stat. L. 735) the number of representatives was fixed at 356 and apportioned among the several states. The act also provided for election "under this apportionment" by districts composed of contiguous territory containing as nearly as practicable an equal number of inhabitants. Provision was also made for the election of representatives at large in the same manner as that contained in preceding acts.

Following the census of 1900, an apportionment act (31 Stat. L. 733) was passed containing substantially the same provisions both in regard to dividing the states into congressional districts and electing representatives at large "under this apportionment". Section 4, however, is as follows:

> "* * * if the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number to such state hereby provided for shall be elected at large, unless the legislatures of said states have provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

Following the census of 1910, by act of congress approved August 8, 1911 (37 Stat. L. 13, c. 5), the number of representatives was fixed at 433, and certain significant changes were made in the language theretofore generally used in such acts. All the prior acts in which reference was made to redistricting, required that the same be done by the legislatures of the several states. At the instance of Congressman Burton

of Ohio, who desired that the referendum provided for by the constitution of that state should be effective so far as redistricting legislation was concerned, section 4 of the 1911 act was made to read as follows:

> "4. That in case of an increase in the number of representatives in any state under this apportionment such additional representative or representatives shall be elected by the state at large and the other representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section 3 of this act; and if there be no change in the number of representatives from a state, the representatives thereof shall be elected from the districts now prescribed by law until such state shall be redistricted as herein prescribed."

The effect of this change was to provide that instead of redistricting being done by the legislature, each state was to be "redistricted in the manner provided by the laws thereof."

For the proper construction of this language, see the opinion of this court in the case of State of Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565.

In 1920 a census was duly taken, but the usual apportionment act was not passed. Various attempts were made to enact such legislation, and certain members of congress were outspoken in criticizing that body for its failure to act. For example, see speech of Senator Vandenberg, contained in Congressional Record, vol. 71, part 2, page 1609, et seq. Representatives in congress since 1911 have been elected pursuant to this act of August 8, 1911, notwithstanding the intervening census of 1920.

Repeated and determined efforts were made to remedy this neglect. In making provision for the census of 1930, congress

for the first time since 1850 included the matter of apportionment in the same act that provided for the taking of the census. The 71st congress by an act approved June 18, 1929 (46 Stat. L. 26, c. 28), the same being entitled:

> "An act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress",

not only made provision for taking the census, but also for what might be termed an automatic apportionment of representatives in congress following the 15th decennial census and every census thereafter. The first twenty sections relate to the taking of the census. Section 21 contains a repealing clause.

Section 22 of the act, dealing with the matter of apportionment, reads as follows:

> "Sec. 22 (a). On the first day, or within one week thereafter, of the second regular session of the Seventy-first Congress and of each Fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each state, excluding the Indians not taxed, as ascertained under the fifteenth and each subsequent decennial census of the population, and the number of Representatives to which each state would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:
>
> (1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one Member;
>
> (2) By apportioning the then existing number of Representatives among the several States according to the

respective numbers of the several States as ascertained under such census, by the method known as the method of major fractions, no State to receive less than one Member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census by the method known as the method of equal proportions, no State to receive less than one Member.

(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning Representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this Act or subsequent statute, to the number of Representatives shown in the statement based upon the method used in the last preceding apportionment. It shall be the duty of the Clerk of the last House of Representatives forthwith to send to the Executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under section 32 or 33 of the Revised Statutes, is charged with the preparation of the roll of Representatives-elect.

(c) This section shall have no force and effect in respect of the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted to the Congress within the time prescribed in subdivision (a)."

Thus did congress protect itself against the recurrence of a failure to re-apportion representatives in congress following

any census that might be taken in the future. The act does not purport to deprive congress of the right to pass an apportionment act, but it does provide machinery for an apportionment in case congress does not act.

Pursuant to section 22, subd. (a), President Hoover transmitted to the 71st congress, at its regular session on December 4, 1930, a message, set forth in the Record (page 2) giving the number of representatives in congress to which each state was entitled under two different methods of computation. Under either method the State of Minnesota became entitled to nine representatives.

The 71st congress adjourned without passing an apportionment act. Hence, subd. (b) of section 22 of the Act of June 18, 1929, became effective, and pursuant thereto the clerk of the house of representatives transmitted to the Governor of the State of Minnesota a certificate showing that the state was entitled to nine representatives in the 73rd congress and in each congress thereafter until the taking effect of a reapportionment under said act or subsequent statute (page 3).

Attention is directed to the fact that all of the apportionment acts above referred to prior to the 1929 act except the 1850 act (9 Stat. L. 432) deal only with the election of representatives in congress under a particular apportionment. These acts were limited in effect to the election of congressmen held pursuant to the apportionments then provided for.

HISTORY OF CONGRESSIONAL REDISTRICTING BY THE LEGISLATURE OF MINNESOTA.

It is conceded that until 1931 whenever the State of Minnesota was divided into districts for the purpose of congressional elections such action was taken by the legislature in the form of a bill and presented to and approved by the governor. See petitioner's brief, Appendix Q, page 63.

As bearing upon the question of practical construction of our state constitution, we do not consider this prior procedure of importance or controlling. If, under the constitution of the United States and of the State of Minnesota, the governor's approval is not necessary to the validity of a redistricting act, the mere fact that the legislature proceeded by a formal bill for an act could not have the effect of virtually amending the constitution of the United States and of the State of Minnesota.

As illustrative of the carelessness, or perhaps over-caution, with which legislatures sometimes act, the following instances are cited:

(a) When the legislature of Minnesota ratified the seventeenth amendment to the federal constitution, it did so by joint resolution of the legislature presented to the governor and approved by him on June 12, 1912. See General Laws of Minnesota, Special Session of 1912, page 56.

(b) When the eighteenth amendment to the federal constitution was ratified by the legislature of Minnesota, it also did so by joint resolution of the legislature submitted to the governor and approved by him on January 22, 1919. See Session Laws of Minnesota 1919, page 756.

(c) Likewise the legislature of Minnesota in ratifying the nineteenth amendment to the federal constitution proceeded

by joint resolution which was approved by the governor September 11, 1919. See Special Session Laws of Minnesota for 1919, page 105.

It will be conceded that the approval of the governor in the above cited instances added nothing to the force or validity of the action of the Minnesota legislature, and the doctrine of practical construction is not applicable.

POINT I.

The term "legislature" as used in Article I, Section 4, of the Federal Constitution means the bi-cameral body described in Article 4, section 1, of the State Constitution.

The legislature of Minnesota obtains its power to prescribe congressional districts in the State of Minnesota, in the first instance, from Article I, section 4, of the federal constitution, the first paragraph of which reads as follows:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

What did the framers of the constitution mean when they used the term "legislature" in the above connection? Did they mean the legislative body of each state, or did they refer to the entire law-making power of the state?

It is the position of the respondent that this term as it is used in Article I, section 4, in the case of Minnesota at least, signifies the bi-cameral body elected by the people of the state for the purpose of making its laws and consisting of the state senate and house of representatives.

This was the view adopted by the supreme court of Minnesota: State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494.

Article 4, section 1, of the constitution of Minnesota provides in part:

> "The legislature shall consist of the senate and house of representatives, which shall meet biennially at the seat of government of the state, at such time as shall be prescribed by law, * * *"

Article 4, section 11 of the state constitution provides as follows:

> "Every bill which shall have passed the senate and house of representatives, in conformity to the rules of each house and the joint rules of the two houses, shall, before it becomes a law, be presented to the governor of the state. If he approves he shall sign and deposit it in the office of the secretary of state for preservation, and notify the house where it originated of the fact. But if not, he shall return it, with his objections, to the house in which it shall have originated; when such objections shall be entered at large on the journal of the same, and the house shall proceed to reconsider the bill. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if it be approved by two-thirds of that house it shall become a law. * * *"

The word "legislature" is used eleven times in the federal constitution and five times in its amendments. In the following instances there can be scarcely any doubt that the word refers to the bi-cameral body holding sessions periodically for the purpose principally of enacting laws for the state:

Article I, section 2, paragraph 1, wherein it is required that electors of members of the house of representatives shall have the qualifications requisite for electors of the most numerous branch of the state legislature;

Article I, section 3, paragraph 1, relating to the election of two senators from each state chosen by the legislature thereof;

Article I, section 3, paragraph 2, wherein the executive of the state is given authority to fill a vacancy in the office of the United States senator in congress during a recess of the legislature until the next meeting of the legislature, which shall then fill such vacancy;

Article 1, section 8, paragraph 17, giving the congress power to exercise legislative authority over all places within the United States purchased by the consent of the legislature of the state in which the same shall be;

Article IV, section 3, paragraph 1, forbidding the formation of a new state by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned;

Article IV, section 4, wherein the United States guarantees to protect every state against domestic violence on application of the legislature, or of the executive when the legislature cannot be convened;

Article V, which deals with the amendments to the constitution, provides that the congress on application of the legislatures of two-thirds of the states shall call a convention for proposing amendments and that the amendments proposed at such convention or proposed by two-thirds of both houses of

congress shall become valid when ratified by the legislatures of three-fourths of the several states;

Article VI, paragraph 3, which requires members of the several state legislatures to be bound by oath or affirmation to support the constitution;

Seventeenth amendment, paragraph 1, which requires that electors of senators shall have the qualifications requisite for electors of the most numerous branch of the state legislatures;

Seventeenth amendment, paragraph 2, which authorizes the legislature of a state to empower the executive thereof to make temporary appointments of senators until the people shall fill the vacancies by election.

The other places in which the word "legislature" is used in the federal constitution are Article I, section 4, and Article II, section 1, paragraph 2.

Article II, section 1, paragraph 2, provides that each state shall appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress. In McPherson v. Blacker, 146 U. S. 1, this court considered the question of whether the legislature of the state of Michigan could provide that presidential electors be elected by districts rather than at large. It was claimed that since the appointment of electors was made by the state, such action could not be by districts and was in violation of Article II, section 1, paragraph 2 of the constitution. This court in the course of its opinion said (page 25):

> "The clause under consideration does not read that the people or the citizens shall appoint, but that 'each state shall'; and if the words 'in such manner as the legislature thereof may direct', had been omitted, it would seem that

> the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of these words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself."

The expression "in such manner as the legislature thereof may direct" was held not to be a limitation on the power of the legislature, but a limitation on the state in respect to any attempt to limit the legislative power of the legislature by constitutional limitations.

Amendment XVII, paragraph 2, undoubtedly employs the expression "legislature" in the same sense as it is used in the first paragraph thereof and undoubtedly has the effect of putting it beyond the power of any state by constitutional limitation, or otherwise, to deprive the legislature of that state of its constitutional right to authorize the executive thereof to fill vacancies in the office of senator in congress.

If we are correct in our deductions, then wherever the term "legislature" is used in the instances above particularly mentioned it refers not to the legislative power of the state as set forth in the constitution of the state, but to the law-making body of each state.

The question then arises whether the framers of the constitution also used the term "legislature" in the same sense in article 1, section 4.

MEANING OF WORD "LEGISLATURE" IN ARTICLE I, SECTION 4.

The petitioner maintains that there is a distinction between the use of the word "legislature" in article I, section 4, and its use in article V and other portions of the constitution, where undeniably the term signifies the bi-cameral legislative body of the state. He claims that this court, in Hawke v. Smith, 253 U. S. 221, so holds. This was an appeal from the judgment of the supreme court of the State of Ohio in an action brought to enjoin the secretary of state of Ohio from spending public money in preparing and printing forms of ballot for submission of a referendum to the electors of that state on the question of ratifying the action of the general assembly in ratifying the amendment to the federal constitution. The supreme court of Ohio affirmed the judgment sustaining a demurrer to the petition. The judgment of the supreme court of Ohio was reversed, this court, in an opinion by Mr. Justice Day saying:

> "The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States. McCulloch v. Maryland, 4 Wheat. 316, 402. The States surrendered to the general government the powers specifically conferred upon the Nation, and the Constitution and the laws of the United States are the supreme law of the land.
>
> "The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article.
>
> "This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed. The proposed change

can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

"The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. Dodge v. Woolsey, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

"All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

"The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by 'Legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, section 2, prescribes the qualifications of electors of congressmen as those 'requisite for electors of the most numerous branch of the state legislature'. Article 1, section 3, provided that senators shall

be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In Article IV the United States is required to protect every State against domestic violence upon application of the legislature, or of the Executive when the legislature cannot be convened. Article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By Article I, section 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be. Article IV, section 3, provides that no new States shall be carved out of old States without the consent of the legislatures of the States concerned.

"There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article I, section 2.

* * * * * *

"The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.

"At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. Hollingsworth v. Virginia, 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with Article I, section 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a foot-note to this argument of the Attorney General, Justice Chase said: 'There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition or adoption of amendments to the constitution.' The court by a unanimous judgment held that the amendment was constitutionally adopted.

"It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to

the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented."

We have previously pointed out that the word "legislature" as used in section 2, par. 1, section 3, par. 1, section 3, par. 2, and section 8, par. 17, of Article I, can logically refer only to the legislative body of the state. It seems unbelievable that the framers of the constitution would use a well understood expression such as "legislature" fifteen times in the constitution and its amendments in one sense, and then in article 1, section 4, use it in an entirely different sense. If the framers of the constitution had intended that the law making power of the state, including the power of gubernatorial veto, should be exercised in prescribing the times, places and manner of holding elections for senators and representatives, they would have used the word "state" or some expression such as "law making power of the state", or "by the legislature with the approval of the executive."

This is especially so when it is borne in mind that until the adoption of the seventeenth amendment, the legislatures elected the United States senators. The governor had nothing to do with their selection. Why, then, should he have any voice in regulations for their election? It cannot be claimed that the framers of the constitution intended that the state legislatures were to be free to act (subject to supervision by congress) in prescribing regulations for electing senators, but that in regulating the election of representatives in congress their acts would be subject to the veto power of an executive. If this had been intended, article 1, section 4, would have been drawn in language that expressed such intent. The word "legislature" cannot have two meanings as used in article 1, section 4.

The constitution of Minnesota is peculiar in that it contains specific authorization for the legislature to prescribe the bounds of congressional districts. Unquestionably, the legislature would have had this power without any provision in the state constitution. Article 4, section 23, of the state constitution reads as follows:

> "The legislature shall provide by law for an enumeration of the inhabitants of this state in the year 1865, and every tenth year thereafter. At their first session after each enumeration so made, and also at their first session after each enumeration made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional, senatorial, and representative districts, and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article."

The supreme court of Minnesota, in State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494, said, in speaking of the power to prescribe the bounds of congresional districts:

> "The governor's veto has no relation to such matters, that power pertains, under the state constitution exclusively to state affairs." (Record, p. 53).

It will be noted that in both the federal and state constitutions the term "prescribe" is used. The legislature of the state is not required by either the federal constitution or the constitution of the state to act in any particular manner. It is not even required to "prescribe" by law. We think that the word "prescribe" is here used in its literal sense: to appoint, direct, determine, give direction, or to lay down as a guide, direction or rule of action. The prescribing may be done in any manner the legislature sees fit. The duty imposed upon the legislature in respect to dividing the state into congressional districts is entirely different from its duties in respect to general

state legislation. The two have no relationship. It is not difficult to perceive the logic of the framers of the federal constitution in imposing this important duty upon the representatives of the people in the several state legislatures. When acting in accordance with article I, section 4, of the federal constitution, the legislature is carrying out a federal mandate. It is acting as an agency of the federal government.

Petitioner claims that the general provisions of article 4 of the state constitution, in relation to presenting bills to the governor for his approval, control the specific provisions of article 4, section 23, of the state constitution. Such a contention is contrary to the well established rules of construction. The same rules are applied in relation to the construction of constitutional provisions as in respect to the statutory law. In 12 Corpus Juris, at page 709, it is said:

> "When general and special provisions of a constitution are in conflict, the special provisions should be given effect to the extent of their scope, leaving the general provisions to control in cases where the special provisions do not apply."

At any rate, the decision of the court below in State ex rel. Smiley v. Holm, supra, is conclusive on this point, so far as the state is concerned.

The judgment of the court of last resort in Minnesota is that when the legislature of the state acts in dividing the state into congressional districts it is not performing a legislative function within the purview of the other provisions of the state constitution which require all bills to be either approved by the governor or passed over his veto before they become laws. The supreme court of Minnesota has said, in effect, that insofar as the state can control the matter, the two bodies of the state legislature are supreme.

Does Article I, section 4, of the federal constitution, require that the action of the legislature in this respect be approved by the governor? The constitution contains no specific provision to this effect, and such a privilege or power on the part of the governor must be read into the section by way of interpretation, so as to delete the word "legislature" and insert in lieu thereof "state" or "lawmaking power of the state".

If the people of Minnesota were to adopt a constitution which provided, among other things, that in dividing the state into congressional districts there must be a vote of three-fourths of the members of the legislature, or that such action must be approved by the supreme court of the state, or that such action would not become effective until the lapse of one year after action by the legislature, could it be seriously contended that such provisions in the state constitution would be effective as against the provisions of article I, section 4?

An interesting case which is directly in point is the election contest of Baldwin v. Trowbridge, reported in 3 Bartlett on Contested Elections, p. 46:

The constitution of Michigan provided that a voter should have resided in the township or ward in which he offers to vote ten days next preceding an election. The legislature of Michigan enacted a law providing that persons in the military service possessing the qualifications provided by the constitution should be allowed to vote wherever they might be, whether within the limits of the state or not. A majority of the committee on elections of the house held this statute to be constitutional insofar as it related to the election of representatives in congress. This decision was based upon the ground that where there is a conflict between the state constitution and the legislative act, in regard to fixing the place of an election for representatives in congress, the power of the legisla-

ture is paramount. This was held to be the necessary effect of article I, section 4, of the constitution of the United States. The language of the majority report is so pertinent to the questions involved in the case at bar that we feel justified in quoting somewhat at length:

> "Here is an unmistakable conflict of authority. The constitution plainly prohibits what the legislature as plainly permits. The one authorizes the election to be held only in the township or ward; the other at military headquarters. The power to act at all in the premises, so far as concerns representatives in Congress, is derived from article one, section four, of the Constitution of the United States, * * *
>
> * * * * * *
>
> "Here the power is conferred upon the legislature. But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature eo nomine, as known in the political history of the country? The committee have adopted the latter construction. At the time the Constitution of the United States was written, there existed in the thirteen states for which it was designed legislatures, created or restrained by some fundamental law, in the shape of charters or constitutions, very much as they exist in the several States now. With this fact before them, is it not probable that the framers of the Constitution, if they intended to confer this power upon State organic conventions, would have chosen some word less liable to misconstruction? It is also apparent, from the manner in which this word is used in other parts of the instrument, that its framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law. Article V provides that Congress 'shall call a convention for proposing amendments * * * on application of the legislatures of two-thirds of the several States'. Also, that amendments

shall be valid when ratified by the legislatures of three-fourths of the several States, or by conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress'. Article VII provides that 'the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.' The convention closed their labors with the following resolution:

"Resolved, That the preceding constitution be laid before the United States in Congress assembled; and that it is the opinion of this convention that it should afterward be submitted to a convention of delegates chosen in each State by the people thereof, under the recommendation of its legislature."

* * * * *

"But the legislation of Michigan may be sustained as against the constitution of that State, even if the word legislature is to be taken in its most enlarged sense. Whatever power the convention of that State possessed to prescribe the places of holding elections for Representatives in Congress was derived, not like its other powers, from the people, but from the Constitution of the United States, and that, too, because it was a *constructive legislature.* The power conferred is a continuing power. It is not used up when once exercised, but survives the dissolution of the convention. The words of the Constitution are as potent then as before, and if there is any legislative body in the State that can properly be called a *legislature,* they appertain to it as strongly as to any prior legislative body. They do not authorize any convention or legislature to tie the hands of its successors. The people authorize a convention to do that where they (the people) have power; but certainly the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States."

* * * * *

"Control over the place of voting is lodged in the legislature by the unmistakable language of the Constitution, and cannot, however disguised by names or circumlocution of words, be transferred to another department of government. Now, the constitution of Michigan either fixes the place of holding the election or it does not. If it does not, there is no conflict between the law and the constitution, and the argument is at an end. If it does, then, as before shown, the convention which adopted it entirely exceeded its power, unless such convention is to be considered a *legislature by construction,* and in that event its power, as has also been shown, was just as ample as that of any subsequent legislature, and no more. The power to prescribe the *place,* whether called a qualification, limitation or condition, is still vested in what the constitution calls 'the legislature', and there it must remain. It cannot be divested by giving it another name, however apt it may be."

If Article I, section 4, of the federal constitution is to be construed as requiring gubernatorial approval of the action of the legislature in performing the federal function of prescribing the time, manner and place of election of representatives in congress, it will mean that in Minnesota two-thirds of the members of its legislature must agree thereto if the governor disapproves. If the constitution of Minnesota may require a two-thirds vote, it may by the same reasoning require a four-fifths or a unanimous vote. If the state constitution gives the governor no such veto power, certainly he acquires none from the federal constitution. Is it within the power of the state constitution so to limit the power of the legislature in prescribing for the election of representatives in congress?

As said in Hawke v. Smith, 253 U. S. 221 (227):

"The only question really for determination is: What did the framers of the Constitution mean in requiring rat-

ification by *'Legislatures'?* That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning."

In support of the majority report in *Baldwin v. Trowbridge,* Representative Beaman of Michigan delivered the principal address, to which the special attention of the court is directed. (See Congressional Globe, First Session, 39th Congress, page 815). He said:

"A Representative in Congress, then, is not a State officer. He is not a creature of the State, but of the National Government. The Legislature, in providing the times, places and manner of elections of Representatives, does not derive its authority from the people of the State through their Constitution, but from the Constitution of the United States. This delegation of power is not in terms conveyed through the people of the State, nor the Constitution of the State, but it is conferred directly upon the Legislature. The power is not simply permissive, but mandatory; and it is of the most plenary character, *subject only to the control of Congress* * * * If the act is repugnant to the Constitution of the State as it respects the places of election of State officers * * * then to that extent it is undoubtedly void. If it is framed in pursuance of and in accordance with the Constitution of the United States in regard to the election of Representatives in Congress, then to that extent it is just as clearly valid."

The provisions of the constitution of the state cannot take the power from the legislature of the state to prescribe the times, places and manner of electing representatives in congress, any more than congress can take from a state the right to fix, either

by its constitution or by its laws, the manner of electing state officers.

Control over the matter of voting for representatives in congress is lodged in the legislature by the unmistakable language of the constitution, and cannot by any process of reasoning be transferred to another department of government.

It is true that in prescribing the manner in which congressional elections shall be conducted, the adoption of corrupt practices acts, and regulations for the nomination of candidates by primaries or by conventions, etc., the legislatures of the several states have quite uniformly proceeded by laws regularly enacted in accordance with their several constitutions. This is not strange, but on the other hand was desirable both from considerations of uniformity and economy. Such laws, insofar as they relate to state officers, must necessarily be adopted in this manner. Insofar as they relate to federal officers, the approval of the governor is merely surplusage.

In considering the meaning of the term "legislature" as used in article I, section 4, it is well to bear in mind that very few of the original states comprising the Union gave such power to their chief executives. Much of the irritation and resentment which led to the war of the Revolution was caused by the arbitrary and unpopular acts of the royal governors. The states were rather slow to give to their chief executives a veto power over the acts of their legislatures.

In the thirteen original states, with the exception of Massachusetts, the legislature was supreme in the law-making domain, except that in New York bills were presented for approval to a revision commission consisting of the governor, the chancellor and judges of the supreme court, or any two of them together with the governor. Not until 1821 was the executive

of New York state given a veto power by the constitution of that state. Pennsylvania gave to its executive veto power in 1790, New Hampshire in 1792, Connecticut in 1818, New Jersey in 1844, South Carolina in 1865, Virginia in 1870, Georgia in 1879, Delaware in 1897, Rhode Island in 1909; and North Carolina has never granted its governor the power of veto.

In view of the above, it cannot be said that the framers of the constitution had in mind that the governors of the several states should have any part in the prescribing of the times, places and manner of electing representatives in congress.

South Dakota Case Considered.

Prior to very recent decisions of the highest state courts in Minnesota, Illinois, Missouri and New York, respectively, there appears to have been only one decision directly bearing on the question here involved.

The supreme court of South Dakota in 1910, which was before the enactment of the 1911 reapportionment law, in the case of State ex rel. Schrader v. Polley, 26 S. D. 5, held that a redistricting act passed by the legislature of that state was not valid after a proper petition for a referendum therein was filed until it had been submitted by referendum to the people and approved by them, as required by the constitution of that state. This decision is based squarely upon the ground that a redistricting act of the state legislature is to be treated the same as an ordinary legislative act, and is subject to the same constitutional limitations as to the manner of passage, approval, veto and referendum.

It holds that article I, section 4, of the federal constitution does not confer upon the state legislatures or to the state itself the power to regulate such elections, because that power inheres in the state, and that the federal constitution merely left

that power where it already reposed. It holds that the word "legislature", as used in said section of the constitution, means the law-making body or power of the state and includes the whole law-making machinery of the state as prescribed by its state constitution.

It is interesting to note that the courts of Missouri and New York, respectively, have not followed the reasoning of the South Dakota court.

POWERS OF STATE AS DISTINGUISHED FROM THOSE OF LEGISLATURE.

By way of contrast with those sections of the constitution in which the "legislature" of a state is given authority to act as distinguished from the "state" or the "executive" thereof, it will be noted that a distinction is carefully and invariably made. Territory ceded to the federal government is by the "state" (Article I, section 8, paragraph 17) although in the same paragraph the federal government may exercise authority "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts," etc. In other words, in ceding territory to the federal government the state acts in its corporate capacity.

In Article V the same may be said of that clause providing [illegible] without its consent, shall be deprived of its equal suffrage in the senate".

In the first paragraph of Article I, section 9, the prohibition against Congress making laws preventing the migration or importation of such persons as any of the states now existing [illegible] prior to the year 1808 undoubtedly [illegible] acting in their full corporate or sovereign

The authority to appoint officers of the militia and train the same is reserved, not to the legislature, but to the states by Article I, section 8, paragraph 16.

The eighteenth amendment provides that "the several states shall have concurrent power" to enforce the amendment by proper legislation. This contemplates the entire law-making power of the states.

In Article V dealing with amendments to the constitution, distinction between the legislature of the state and the state itself is very clear. On application of the legislatures of two-thirds of the states, congress shall call a convention for proposing amendments. Amendments proposed by such a convention, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as either mode of ratification may be proposed by congress, become a part of the constitution.

Whenever the constitution designates a state agency to perform specified federal functions a clear distinction is made between the state, the legislature and the executive of the state.

The matter of elections to the house of representatives in congress was important. Had the framers of the constitution intended that the action of a state legislature under Article I, section 4, should be subject to the approval of the executive of a state, it would seem that the deliberate and wise framers of the constitution would have said so and not have left the matter open to doubt.

It is significant that the only federal officers whom the people had any direct voice in choosing under the constitution as originally framed were their representatives in congress. Senators were elected by the state legislatures. The president and vice president were elected by a body of men appointed in each state "in such manner as the legislature thereof may direct".

As time has gone on, the people of the United States have chafed under their rather indirect participation in federal matters, and the result of this may be seen in the seventeenth amendment.

PRACTICAL CONSTRUCTION.

Much is made of the assertion of the petitioner that the states have quite uniformly for one hundred and forty years prescribed congressional districts by laws enacted as required by their respective constitutions. If the states have proceeded erroneously in this respect at least no one has been injured thereby. No vested rights have been acquired which should cause a court to hesitate to announce now the proper construction of this constitutional provision.

Courts do not give much weight to the doctrine of practical construction in respect to the application or interpretation of constitutions. In State ex rel. University v. Chase, 175 Minn. 259 (273), the supreme court of Minnesota said:

> "Resort cannot then be had to the extraneous to obscure what is already clear, and so start again the process of construction and excuse resort to further extraneous aids. The extraneous or subsequent cannot be resorted to as a means of refuting what is inescapable from the instrument itself in application to its subject. It is not then permissible to adopt any different practical construction of a constitution, however long continued or well established, or however distinguished its authorship. Hence, every authoritative statement of the doctrine of practical construction makes it applicable only in a case of doubtful meaning."

State ex rel. Smiley v. Holm, 184 Minn. 228, 238 N. W. 494 (500);

United States v. Sprague, 282 U. S. 716 (730);

Cooley on Constitutional Limitations, 6th Ed. p. 85,

Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677 (690).

In People v. Tremaine, 252 N. Y. 27 (47), the court said:

"Now comes a serious conflict between the executive and administrative officers and the Legislature by reason of appointments amounting to a substantial encroachment by the latter upon the powers of the former. General acquiescence in a custom which, all things considered, may not have resulted in a harmful violation—or indeed, any violation—of the Constitution, does not preclude a contest when substantial rights are insisted upon. (Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 579). In times of peace and harmony constitutional rights are not asserted. When a crisis presents itself the Constitution is invoked and when a justiciable question is presented to the courts they must decide it."

In the matter of Wendell v. Lavin, 246 N. Y. 116, the court of appeals of New York held unconstitutional a law which had been enacted and acted upon for more than twenty-seven years, saying that the question must be answered irrespective of the action of public authorities for the last quarter of a century and that neither practice nor intentions can modify the express provisions of the constitution.

RECENT DECISIONS.

Aside from the Minnesota case now before the court, the courts of last resort in the states of Missouri, Illinois and New York respectively have rendered decisions which, so far as we are advised, are not yet in print.

THE MISSOURI CASE.

In Missouri, as in New York and Minnesota, the state was redistricted by the legislature without the governor's approval. The supreme court of Missouri in State ex rel. Carroll v. Becker held that sections 3 and 4 of the act of 1911 requiring representatives to be elected by districts prescribed by law were still in full force and effect, and also construed the word "legislature" as used in Article I, section 4 of the federal constitution to contemplate a legislative act adopted in accordance with the constitution of the state. The court took the view that Davis v. Hildebrant, 241 U. S. 565, was decisive on this point.

The Missouri decision is in direct conflict with the decision of the supreme court of Minnesota now under review. However, the Missouri case is not an authority against respondent's contention if this court takes the view that it is for the court of last resort in each state to determine whether or not its legislature has acted in accordance with the constitution of that state in dividing the state into congressional districts.

ILLINOIS CASE.

In Moran et al. v. Bowley, decided by the supreme court of Illinois on January 13, 1932, the court had to deal with an act which was passed by the general assembly and duly approved by the governor. The claim was made, however, that under the terms of this act the population of the various districts were so grossly unequal as to constitute a palpable violation of sections 3 and 4 of the 1911 act which the court held still to be of force and effect notwithstanding the 1929 apportionment act of congress . The supreme court of Illinois did not

agree with the holding of the supreme court of Minnesota that the 1911 act was no longer in effect. Had it so held, undoubtedly the decision would have been different. The court also held that the act constituted a violation of Article II, section 18 of the constitution of Illinois providing that all elections shall be free and equal.

NEW YORK CASE.

The court of appeals of New York In the Matter of the Application of Koenig et al., v. Flynn, decided February 9, 1932, held that a joint resolution of the legislature of that state dividing the state into forty-five congressional districts, which resolution was not submitted to the governor for his approval, is ineffective as an action of the legislature under article I, section 4 of the federal constitution. It held that Article I, section 4 of the federal constitution contemplates that the action of a state legislature should be in the form of a bill to be enacted into law and submitted to the governor in accordance with the provisions of the state constitution. The court also held that sections 3 and 4 of the 1911 act are still in effect.

Both the Missouri and New York decisions refer to Davis v. Hildebrant, supra, as an authority which is determinative. We will discuss this case later on in this brief.

POINT II.

The Act of August 8, 1911 (37 Stat. L. 13, c. 5) Is No Longer in Force.

The 1911 act, like the preceding series of reapportionment acts, with one exception, to-wit, the 1850 law (9 Stat. L. 432) is limited in its scope and application to elections held pursuant to the apportionment made pursuant to the act. This is apparent from a reading of the law.

The title of the act is "An Act For the Apportionment of Representatives in Congress among the Several States under the Thirteenth Census." Section 1 provides for four hundred thirty-three members of the house of representatives, and apportions a certain number to each state.

Section 2 provides for the election of additional representatives in case the territories of Arizona and New Mexico, or either of them, shall become states in the union before the apportionment of representatives under the next decennial census shall have been made.

Unquestionably both sections 1 and 2 are no longer of any force or in effect.

Section 3 provides that in each state entitled *under this apportionment* to more than one representative, the representatives to the sixty-third and each subsequent congress shall be elected by districts composed of a contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants. Said districts shall be equal in number to the number of representatives to which such state may be entitled in congress, no district electing more than one representative. It will be noted that by its express terms section 3 applies to the election of representatives in each state entitled "under this apportionment" to more than one repre-

sentative. This section cannot be construed to apply to representatives elected under any other apportionment. The 1929 act constituted a new apportionment and hence this section of the 1911 act is no longer of force and effect. At the time the 1911 act was passed, undoubtedly congress thought that in accordance with custom dating back to 1790, and pursuant to section 2 of the fourteenth amendment, that following the 1920 census the congress would pass a new apportionment act. No such act was passed, however, until 1929, and hence from 1912 to 1930 congressmen were properly elected in accordance with the apportionment made by the 1911 law.

Section 4 of the 1911 act certainly cannot apply to the elections to be held in 1932. This section reads:

> "That in case of an increase in the number of Representatives in any State *under this apportionment* such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts *now* prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there is no change in the number of representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed."

This became effective August 8, 1911, and hence the districts "*now* prescribed by law" refers to August 8, 1911. Obviously this cannot apply to districts which are prescribed in the various states in 1932. The 1911 act makes no provision as to what shall be done when there is a decrease in the number of representatives and no redistricting has been consummated by the legislature. If the action of the Minnesota legislature as evidenced by H. F. 1456 is ineffective, then in the absence of a

valid redistricting act there is no provision whatsoever for the election of representatives in congress from this state. The legislature of Minnesota is not now in session and its next regular session will be in January, 1933. Whether a special session would be called to meet this emergency is a matter resting wholly within the discretion of the governor. Mason's Minnesota Statutes of 1927, section 24; General Statutes of 1923, section 24.

As bearing upon the question of whether or not the 1911 act, or any portion thereof, is still in effect, let us consider what the situation in Minnesota would be if the 1929 reapportionment act had increased the number of congressmen from this state and the legislature had failed to redistrict the state. If section 4 of the 1911 act is still the law, then in Minnesota the additional representatives would be elected at large and the others by the districts "now prescribed by law". The word "now" must refer to August 8, 1911. See U. S. C. Title II, sec. 4. On that date there were nine congressional districts of this state prescribed by the Laws of Minnesota for 1901, p. 97, ch. 92. By the 1911 apportionment act Minnesota was given ten congressmen, and the legislature promptly enacted Laws 1913, p. 743, ch. 513, creating ten districts. Let us assume that the act of 1929 gave the State of Minnesota eleven congressmen. Applying section 4 of the 1911 act, it would require that ten congressmen be elected from the nine districts, as set forth in Laws of Minnesota 1901, ch. 92, and that one congressman be elected at large. Obviously, this creates an intolerable situation which could not have been contemplated or intended by congress. As we understand it, this is precisely the situation in the State of New York.

The 1911 law is not of a general and permanent character, and plainly affects only the election of congressmen under the apportionment made by that act.

As pointed out by Mr. Justice De Young in his dissenting opinion in the Illinois case, the apportionment act of 1911 was superseded by an act of the seventy-first congress entitled "An Act to provide for the Fifteenth and Subsequent Decennial Censuses and to provide for Apportionment of Representatives in Congress", approved June 18, 1929. Section 21 of this act provides that the act "entitled 'An act to provide for the fourteenth and subsequent decennial censuses,' approved March 3, 1919, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed." Both the title to and the body of the 1911 act disclose in express terms that no apportionment other than the one under the thirteenth census was in the contemplation of congress. The history, nature, purpose and language of the various apportionment acts referred to in an earlier part of this brief disclose an evident intention on the part of congress to have each act replace its predecessor. The provisions of the 1911 act were designed for a special purpose which has been accomplished. Its provisions can have no force or application to an apportionment under the fifteenth census. Section 21 contains an express repeal of inconsistent laws and parts of laws, but aside from this the act of 1911 has expired by its very terms.

Whatever may be said in favor of the desirability of having representatives in congress elected by districts and of having these districts composed of contiguous territory with approximately equal populations, it seems clear to us that we cannot ignore the legal effect of the 1929 act upon the 1911 act.

For reasons with which we are not concerned, congress has chosen to remove by the repealing clause of the act of 1929 the requirement that representatives in congress shall be elected by districts of a certain character and that the legislature shall act in the manner provided by the laws thereof.

Davis v. Hildebrant, 241 U. S. 565.

An analysis of the above case, so strongly relied upon by the petitioners, shows that it falls far short of being decisive of the case at bar.

By an amendment to the constitution of Ohio adopted in 1912 the legislative power of the state is expressly declared to be vested not only in the general assembly of the state, but in the people in whom a right is reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly. In 1915 the general assembly passed an act redistricting the state for congressional purposes. A proper petition for referendum was filed, a vote taken and the law disapproved. Thereupon a suit was brought against the state election officers for the purpose of preventing them from heeding this referendum vote and requiring them to proceed to discharge their duties in the next congressional election upon the assumption that the referendum action was void and that the law passed by the general assembly was valid and final. It was claimed that both the state constitution and Article I, section 4, of the federal constitution were violated in the attempt to make the referendum a part of the legislative authority in respect to the election of members to congress. The supreme court of Ohio held that the referendum was a part of the legislative power of the state, made so by the constitution, and that nothing in the Act of Congress of 1911 or in Article I, section 4, of the federal constitution operated to the contrary. This court affirmed the action of the lower court and, in an opinion written by Mr. Chief Justice White, said (page 567):

> "Without going into the many irrelevant points which are pressed in the argument and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view—the state power, the power of Con-

gress, and the operation of the provision of the Constitution of the United States referred to.

"1. As to the state power, we pass from its consideration, since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the state had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit.

"2. So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since under the act of Congress dealing with apportionment which preceded the act of 1911, by sec. 4 it was commanded that the existing districts in a State should continue in force 'until the legislature of such State in the manner herein prescribed shall redistrict such state,' (act of February 7, 1891, c. 116; 26 Stat. 735), while in the act of 1911 there was substituted a provision that the redistricting should be made by a State 'in the manner provided by the laws thereof.' And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new

words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged. Cong. Rec., Vol. 47, pp. 3436, 3437, 3507."

Concluding, the court said (page 570):

"It is apparent from these reasons that there must either be a dismissal for want of jurisdiction because there is no power to re-examine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied."

It will thus be seen that there is nothing in the decision of this court in the above cited case which holds that the redistricting of a state is necessarily subject to the approval of the executive. The holding, as we understand it, is to the effect that where by the laws of a state a referendum is made a part of the legislative power of the state and the court of last resort in that state has held that this is so, and that the action of the legislature in passing a redistricting act is subject to the referendum, that there is nothing either in the federal constitution or in the 1911 act which prevents the operation of the referendum.

But in Minnesota the supreme court has held in State ex rel. Smiley v. Holm, supra, that the governor is not a part of the legislature when it comes to dividing the state into congressional districts. Thus, so far as the state is concerned, in the words of Mr. Chief Justice White, the matter is foreclosed. Unless by the terms of Article I, section 4, the entire legislative power of the state must be called into operation in order to pass a valid redistricting measure, the case of Davis v. Hildebrant is not in point.

If, as we believe, the 1911 act has ceased to have any potency, the same result would follow.

POINT 3.

House File 1456 does not Violate the Act of August 8, 1911 (37 Stat. L. 13, Ch. 5).

The respondent respectfully urges that the question of the validity of the action of the state legislature, as set forth in House File 1456, is for determination under the constitution and laws of the State of Minnesota.

The constitution of the United States gives authority to the legislature of each state to "prescribe" the times, places and manner of holding congressional elections. The federal constitution does not define what shall constitute a state legislature, nor require that it be constituted in any particular or peculiar way. Generally, legislatures are the law-making bodies of the state, directly elected by the people:

Hawke v. Smith, 253 U. S. 221.
Brooks v. Fischer, 79 Cal. 173.
Barlotti v. Lyons, 182 Cal. 575.
Decher v. Secretary of State, 209 Mich. 565.
In re Opinion of the Justices, 118 Maine 544.

We take it as elementary that if the people of Minnesota should provide by appropriate constitutional amendment for the election, or perchance, for the appointment of a single body of men to make the laws without being subject to executive veto, there is nothing in the federal constitution to prevent it. The legislature of a state might conceivably be a small board, commission or committee. The duties of the legislature and executive departments might be commingled, as is now frequently the case in cities operating under what is familiarly called the commission form of government. What constitutes

the legislature of a state is peculiarly a matter for the people of that state. When the question arises as to whether or not the legislature has acted in accordance with the constitution or the laws of a state, the judgment of the highest court of that state is conclusive on the question.

Carstairs v. Cochran, 193 U. S. 10.

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445.

Terrace v. Thompson, 263 U. S. 197—affirming 274 Fed. 841.

First Nat'l. Bank of Garnett v. Ayers, 160 U. S. 660.

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61.

Price v. Illinois, 238 U. S. 446.

Montana v. Rice, 204 U. S. 291.

It will be noted from an examination of the petition filed herein in the district court of Minnesota that the petitioner originally objected to the procedure of the state legislature as not being in compliance with the provisions of the state constitution in respect to the enactment of laws. His main objection was to the manner in which House File 1456 was adopted.

The court below held that in districting the state the legislature was acting not strictly in the discharge of legislative duties as a law-making body acting in a sovereign capacity, but more as an agent of the federal government (Record p. 53). More specifically, the court said (p. 53):

> "The legislature in districting the state is not, strictly in the discharge of legislative duties as a lawmaking body, acting in its sovereign capacity—but is acting as representatives of the people of the state under the power granted by said Art. I, sec. 4. It merely gives expression as to district lines in aid of the election of certain federal officials; prescribing one of the essential details serving

primarily the federal government and secondly the people of the state. The legislature is designated as a mere agency to discharge the particular duty. The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs.

"The word 'legislature' has reference to the well-recognized branch of the state government—created by the state as one of its three branches for a specific purpose—and when the framers of the federal constitution employed this term we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof. We would not be justified in construing the term as being used in its enlarged sense as meaning the state, or as meaning the law-making power of the state."

If it is the will of the people of the State of Minnesota, as interpreted by the highest state court, that the governor's approval is not necessary to give potency to such a regulation of the legislature, we can see nothing in the federal constitution to prevent. The question appears to be one for each state to determine for itself. The framers of the federal constitution went only so far as to impose this duty upon the legislatures of the several states. The matter of determining how the legislature of a particular state is to be constituted was left to the people of that state.

If our position is tenable as to this, then it would appear that no federal question is involved, and the situation would be the same as it was in Davis v. Hildebrant, supra, where the court said that there must be either a dismissal for want of a federal question or an affirmance, it being indifferent as to the result which course is pursued.

THE FACT THAT PARTS OF 1911 ACT APPEAR IN UNITED STATES CODE IS OF NO SIGNIFICANCE.

Petitioner attaches great weight to the fact that sections 1, 3, 4 and 5 of the 1911 act are included in the United States Code of 1926 under Title II as sections 2, 3, 4 and 5 respectively, since the code is intended to contain laws of the United States general and permanent in their character in force on December 7, 1925. This is said to make at least sections 3, 4 and 5 of the 1911 act permanent legislation.

We do not understand that the codifiers of the code had authority to change laws or that the adoption of the code had the effect of making laws of the United States permanent which prior thereto had been temporary in character. Mason's U. S. C. 1926, p. 1, provides:

> "* * * but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this code and the corresponding portion of legislation heretofore enacted, effect shall be given for all purposes whatsoever to such enactments."

It will be noted that the codifiers made certain changes in the language of the 1911 act when it was put into the code. The words "the sixty-third and each subsequent" in section 3 are omitted where it appears in the code as Title II, sec. 3. In Title II, section 4, instead of reading that the other representatives shall be elected "by districts now prescribed by law", the word "now" is omitted, and "on August 8, 1911" is inserted in place thereof. Substantially the same thing is done later in the section providing that where there is no change in the number of representatives from a state, the rep-

resentatives shall be elected from the districts prescribed by law "on August 8, 1911". The 1911 act contains the word "now" in place of "August 8, 1911". These changes are not of any particular importance because in our opinion they merely express the intent of the congress which enacted the 1911 act. If the 1911 act is still in force, in case of an increase in the number of representatives in a state and the failure by the legislature thereof to redistrict, the additional congressmen would be elected at large and the others by the districts as they existed in the state *on August 8, 1911.* The confusion and inconsistency that will arise from such a construction is apparent.

INEQUALITIES IN POPULATIONS OF SEVERAL DISTRICTS INSUFFICIENT TO INVALIDATE ACT.

Still assuming, for the purposes of this argument, that the 1911 act is still in force in so far as it requires that districts shall be composed of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants, we contend that no sufficient showing has been made which justifies the court in declaring that this mandate of the congress has been violated by the Minnesota legislature, in the instant case.

The court below disposed of this contention of petitioner as follows (Record, page 56):

> "Dividing the territory into districts under Art. I, § 4, involved discretion, a discretion the extent of which cannot be well defined; a discretion on the part of the legislature, not on our part. If the provisions of the 1911 act were still in force, as contended, and serving as a command as to how the duty should be performed, we would be required to hold that the court could interfere only where such discretion is plainly and grossly abused. It

is our function to review questions of law and not to revise official action involving the exercise of discretion. We are not to say whether the division is the best that could have been made, but whether the legislature proceeded according to legal rules. The legislature in this matter was exercising a political and discretionary power granted by the federal constitution for which the members are amenable to their constituents. How nearly equal in population such districts may be made in actual practice must depend largely upon the integrity of the legislature; and we find nothing in the record authorizing our interference even upon the hypothesis that the rule of conduct, as contained in the act of 1911, still prevails. * * * Though a case might arise that would require our disapproval this does not seem to be such."

We respectfully suggest that the holding of the supreme court of Minnesota on this point is entitled to great weight. It makes little, if any, difference to the rest of the citizens of the United States as to how this state is divided into congressional districts. The important thing is that congress has provided that Minnesota shall have nine representatives in the lower house of congress. The times, places and manner of electing these representatives is, by Article I, section 4 of the constitution, imposed upon the legislature of each state. So long as the state of Minnesota is represented by nine congressmen and no more, fairly and honestly elected by the people of the state, we fail to see how either the federal government or the people of other states are concerned.

The division of territory into congressional districts is an administrative function of the legislature and not a judicial function. It is a matter which, in its very nature, requires the exercise of discretion. Such discretion is to be exercised by the body empowered to create these districts and not by the courts. The rule appears to be well established that the

courts will interfere only when such discretion is plainly and grossly abused.

In State ex rel. Meighen v. Weatherill, 125 Minn. 336 (342) the supreme court of Minnesota said:

> "The matter of redistricitng the state into congressional or legislative districts is so essentially administrative or legislative, restrained only by the Constitution, that the courts interfere therein only when there appears a clear and palpable violation of the fundamental law. There is committed to the legislature a wide discretion in the premises the bounds of which cannot be well defined."

Many of the cases involving districting and apportionment acts by state legislatures for state purposes are to be found in the note to Donovan v. Suffolk county, etc., 225 Mass. 55, 2 A. L. R. 1334.

People ex rel. Carter v. Rice, 135 N. Y. 473, was an action to enjoin the secretary of state from acting under an apportionment act of 1892. The constitution of New York vested in the legislature power to alter the senate districts after each census enumeration, and required that this be done so that each senate district should contain, as nearly as may be, an equal number of inhabitants. The court of appeals of New York held that the legislature was possessed of a certain amount of discretion in carrying out this power and that the court had no jurisdiction to review the exercise of such discretion unless it appeared that it had been plainly and grossly abused. The words of Peckham, J., in this connection are forceful (p. 500):

> "We start then with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might in its exercise

possibly have come nearer to an equality, after complying with the specific conditions mentioned in the constitution? This would be to assert a power in the court to supervise the use of the discretion granted to the legislature, if such discretion were exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. * * * We think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the constitution, unless it is plainly and grossly abused. * * * The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the legislature."

Another leading case is that of People ex rel. Woodyatt v. Thompson, 155 Ill. 451.

This was a suit involving the constitutionality of a state apportionment act. The senatorial ratio was approximately 75,000. The districts outside of Cook county contained from 62,000 to 88,000 inhabitants, and those in Cook county averaged 79,000 inhabitants. The act was sustained. It was held that the courts cannot inquire into the motives which may move the legislature to enact a statute making an apportionment of legislative districts in the manner in which it was made, such motives being presumed to be patriotic. Whether or not the nearest practicable approximation to perfect compactness and equality has been attained is a question for the legislative discretion.

A case frequently referred to in the books and cited as an authority is that of In Re Baird, 142 N. Y. 523. It appeared in this case that the board of supervisors of the County of Kings was required by the constitution to apportion assembly

districts for the election of members of the assembly from that county. The constitution provided that these districts be equal as to population so far as that was reasonably attainable and be composed of convenient and contiguous territory with the towns and counties undivided. There were eighteen assembly districts in the county, and the population of the county divided by eighteen equalled 54,877. Eleven of these districts under the act had populations from 53,000 to 58,000, and the remainder from 48,000 to 61,000. The appeal raised the question of how far the court could interfere with the action of the supervisors in the discharge of ministerial duties involving the exercise of discretion. In the opinion of the court it was said:

"I do not think that the present apportionment is of such a character as to justify the interference of the courts. * * * It was made by the body having the power and discretion under the constitution for that purpose. It adopted no erroneous rule or principle of action as it did in making the first apportionment. * * * The great and principal function of this court is to review questions of law passed upon by inferior courts or arising from the action of ministerial or governmental bodies, and not to revise official action involving the exercise of discretion. If this apportionment does not, upon the face of the record, indicate such a manifest abuse of discretion as virtually to amount to an evasion or disobedience of our former decision, then the court cannot interfere or set it aside without drawing to itself powers which have been confided by the constitution to other departments of the government. * * * There is inequality of population in the districts as formed, but not to such an extent or in such a degree as to warrant us in holding as matter of law that the board has abused its powers or refused to exercise its discretion. * * * The question here is not whether the division is the best that could have been made, but whether the board had jurisdiction and proceeded according to legal rules. If so, the courts cannot require

> them to undo the work on account of errors, mistakes or inequalities resulting from the exercise of their discretionary powers, and to perform it in some other way, without assuming governmental powers with which they have not been intrusted by the constitution or the laws."

Attention is also directed to State ex rel. Warson v. Howell, 92 Wash. 540. The inequalities were admitted by the court to be exceedingly gross. The court said, however, that this fact furnished no ground for declaring the legislative apportionment unconstitutional. While it argued strongly against the failure of the legislature to perform its duty, it stated no ground for setting aside the legislative apportionment valid when enacted. In this case the attack was made upon apportionment which had been made some years prior and which the legislature refused to change notwithstanding the great changes in population which made the districts grossly unequal as to population. It was held that the legislature could not be compelled to redistrict the state as directed by the constitution, and as a corollary thereto that an apportionment act, lawfully enacted, will continue in force until superseded by a subsequent valid act.

We direct the attention of the court to the case of Wise v. Bigger, 79 Va. 269. The general assembly of the state of Virginia divided the state into congressional districts. Various objections to the act were made by one of the sitting congressmen, Mr. Wise. Most of the points made are not material to this controversy, but on the question of inequality of population, on page 281 of the opinion, the court uses this language:

> "It is further alleged by the relator that this said act is unconstitutional and void because the senate had no right to recognize *'pairs'*; and because the bill does not conform to the requirements of Article 5, Sec. 18, of the Con-

stitution of Virginia by making the congressional districts of contiguous counties, cities and towns, compact, and, as nearly as may be, equal in population. Each house of the general assembly is vested with the power of making rules for its own government; and it necessarily has the power to grant members leave of absence, excuse them from voting, when proper, and recognize what are called *pairs. The laying off and defining of the congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people, whose representatives they are.*"

All of the above cases deal with state apportionments or districting of some kind. We now refer to the case of Richardson v. McChesney, 128 Ky. 363, 108 S. W. 322, 129 A. S. R. 299, wherein the supreme court of Kentucky ruled that a legislative apportionment of the state into congressional districts cannot be judicially reviewed in the absence of a constitutional provision controlling apportionment. It was pointed out that the constitution of the United States contains no direction to the states on the matter of apportionment into congressional districts and that there was nothing in the state constitution referring to this matter. The suit was brought to have declared invalid acts of 1890 and 1898, respectively, dividing the state of Kentucky into congressional districts. As we understand the case, Kentucky was entitled to eleven congressmen and had a population of 1,648,690, making the exact proportion of population of each district 149,881. In the opinion a table is set forth showing that the eleven districts contained populations ranging from 114,024 to 188,124. In its decision the court said:

"There is no mention of congressional districts in the Constitution of the state; nor is there in that instrument any direction to the General Assembly as to how the dis-

tricts shall be laid off. In the matter of dividing the state into congressional districts the legislature, at least so far as the power and authority of this court extends, is supreme. This court has no control over its action. It would be exceeding the power granted us to undertake to revise or annul a legislative act relating to a subject over which the legislature has absolute control. Except when limited by the Constitution of the State, the General Assembly, especially in administrative and political affairs, is beyond the reach of the judiciary of the state. We have no authority to pass judgment upon its acts. * * * If, in the matter of dividing the state into congressional districts, this court should undertake to declare invalid the apportionment made by the legislative department, it would simply result in setting up our judgment against the judgment of the members elected for the purpose of performing this duty. We would be putting up our opinion against those in whom the exclusive right to regulate this matter has been lodged, and be arrogating to ourselves wisdom, honesty, and fairness superior to those charged by law with the control of these matters. * * * But in the matter of congressional districts we find nothing in our state Constitution to guide us. There is nowhere any limitation upon the power of the legislature, and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency, or propriety of laws enacted by the General Assembly, unless they conflict with the Constitution. Judge Cooley in his work on Constitutional Limitations, p. 200, thus states with great force and clearness the prevailing doctrine upon this subject: 'The moment a court ventures to substitute its own judgment for that of the Legislature in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible

to set limits to its authority and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the power apportioned to the other departments, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

If the statements made in the debates in congress preceding the adoption of the 1929 census and apportionment act are worthy of belief, there are many truly glaring inequalities in the populations of various congressional districts. For example:

(Congressional Record, Vol. 71, Part 2, page 2277.) Mr. Dowell stated that in Michigan there were some districts containing over 225,000 inhabitants and other districts containing over 400,000 inhabitants. Congressional Record, Vol. 71, Part 3, page 2481, contains a table purporting to show the census figures in the various congressional districts of the state of

Missouri in 1920. Two districts had as low as 138,000 inhabitants, one district contained over 312,000, one over 360,000 and one over 521,000.

(Congressional Record, Vol. 71, Part 3, page 2484.) Mr. Ludlow of Indiana, stated that one member of congress represented 150,000 inhabitants and another represented 1,500,000.

It is our belief that the legislature of Minnesota might lawfully and in full compliance with the provisions of the federal constitution provide for the election of all the congressmen at large on a general ticket. It might divide the state into two, three, or any other number of districts and assign a different number of congressmen to each district. It might make any arrangement, so long as not more than nine congressmen were elected from this state. The election of such congressmen would, of course, be subject to final approval by the house of representatives in congress.

The legislature of this state, after protracted debate and conferences and negotiations in committee and otherwise at the close of its legislative session prescribed the boundaries of nine congressional districts. Assuming that this action of the legislature was not subject to veto by the governor, can it be said that the inequalities in population are so manifest and glaring as to call for judicial interference?

There were many matters to be taken into consideration by the legislature in redistricting the state for congressional purposes, aside from the single element of population. As pointed out in the decisions, unless on the face of the record the redistricting is so grossly unequal that it evinces a reckless and deliberate disregard of fundamental law on the part of the legislature, the administrative act of the legislature will not be interfered with.

Admittedly there are inequalities in the population of the nine congressional districts as delimited by H. F. 1456. If each of the nine districts contained an exactly equal number of inhabitants there would be 283,509 persons in each congressional district. It is manifestly impossible to divide the state with any proper regard for geographical and other considerations so as to bring about such an ideal result.

The redistricting of a state for either legislative or congressional purposes is usually a delicate and difficult matter. The final result is usually arrived at through compromises and concessions. Never is absolute equality attained. While undoubtedly a court could divide the state of Minnesota into nine congressional districts which would be more nearly equal in population, it would involve the exercise of a discretion which is not vested in the judicial branch of the government. Under the federal constitution, it is our earnest contention that whatever discretion there may be is to be exercised by the state legislature without interference by the governor or any other branch of the state government.

REASONS FOR NOT MAKING PROVISION FOR ELECTION OF CONGRESSMEN AT LARGE IN THE 1929 LAW.

The 1929 reapportionment and census act was approved June 18, 1929. Congressmen were not to be elected thereunder until November, 1932, more than three years later. Ample time was given to the legislatures of the several states, where redistricting was required by reason of the reapportionment, to perform this important political duty. The members of congress no doubt felt that three years was long enough to enable all the legislatures to act. They may have assumed

that there was no reasonable possibility of their failing to redistrict and therefore no need of making provision as to what should be done in case of failure to redistrict.

The 1911 act became effective August 8, 1911. Congressmen were to be elected in November, 1912. In many states the legislatures would not be convened in the meantime. This was the case in Minnesota, where the legislature did not meet in regular session until January, 1913. It was reasonably certain that the legislatures of some states unless called in extraordinary session, would not have an opportunity to act. The need of enacting an emergency provision, to take effect in case of failure to redistrict, was apparent. The same need did not exist when the 1929 act was passed.

POINT IV.

THERE IS NO VIOLATION OF THE FOURTEENTH AMENDMENT.

If we understand petitioner's position correctly, he asserts that H. F. 1456 violates the fourteenth amendment to the constitution. He claims that the voters in the districts containing the larger population are in some manner discriminated against or deprived of a right guaranteed by the fourteenth amendment.

The fourteenth amendment, in section 1, deals with privileges and immunities of citizens of the United States, and the right of suffrage is not one of them. This amendment does not add to the privileges and immunities of citizens.

Minor v. Happersett, 21 Wall. 162.

The right of voting is a privilege arising under the constitution of the state and not under the constitution of the United States. If the right belongs to any particular person it is because such person is entitled to it by the laws of the state where he offers to exercise it and not because of the constitution of the United States. In Pope v. Williams, 193 U. S. 621 (632) this court said:

> "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. * * * It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a State is within the jurisdiction of the state itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution."

In the opinion, Mr. Justice Peckham (page 633) points out that the electors of members of congress must be entitled to vote under the state statute, citing Article I, section 2 of the constitution, and that the question of whether or not conditions prescribed by the state are reasonable or unreasonable is not a federal one. See also

McPherson v. Blacker, 146 U. S. 1 (38),

where the court said:

> "The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been."

Also see

United States v. Anthony, 11 Blatchf. 200;
United States v. Cruikshank, 92 U. S. 542;
United States v. Reese, 92 U. S. 214.

In McPherson v. Blacker, supra, at page 38, the court specifically says:

> "The first section of the Fourteenth Amendment does not refer to the exercise of the elective franchise."

No citizen of Minnesota is deprived of his right to vote by H. F. 1456. No citizen is discriminated against within the meaning of the fourteenth amendment.

Petitioner, on page 30 of his brief, cites a number of authorities in support of his contention that the fourteenth amendment has been violated.

The first case, Nixon v. Herndon, 273 U. S. 536, deals with discrimination against colored persons in the matter of voting. We have no quarrel with this authority. The purpose of the fourteenth amendment was to prevent just such discrimination.

Swafford v. Templeton, 185 U. S. 487, involves an action brought by a white man against certain election officials at a congressional election to recover damages for wrongful refusal to permit the plaintiff to vote. The refusal of the defendants was based upon a statute of Tennessee which the plaintiff attacked as class legislation in violation of the fourteenth amendment. The case was dismissed in the circuit court for want of jurisdiction, and the holding of this court is to the effect that the case was one arising under the constitution of the United States, and that the federal courts had original jurisdiction.

The other four decisions cited on pages 30 and 31 of petitioner's brief are not in point and comment is unnecessary.

House File 1456 is a valid determination by the legislature under the constitution of Minnesota. The petitioner has no right guaranteed to him by the federal constitution or by the federal statutes that actions of a state legislature shall follow any particular procedure. The matter of procedure is for the people of each state. The constitution delegates to the legislature of each state the right to act under Article I, section 4. Whether the legislature shall prescribe the regulations therein referred to by statute, joint resolution, or otherwise, and whether such regulations shall be subject to veto power or to the right of referendum, are left to the determination of the people of each state:

Davis v. Hildebrant, 241 U. S. 565.

The authorities seem to be squarely to the effect that the proceedings of a state legislature in the enactment of a law do not give rise to a federal question. The determination of the state courts that a state law has been validly enacted in accordance with the constitution of that state is final.

Smith v. Jennings, 206 U. S. 276,

Mer. & Manf. Bank v. Pennsylvania, 167 U. S. 461,
Montana v. Rice, 204 U. S. 291,
King v. West Virginia, et al., 216 U. S. 92.

Whether or not the action of a state legislature conflicts with the constitution of the state does not present any question for review by the Supreme Court of the United States.

Vol. V, Hughes, Federal Procedure, sec. 3242.

While the authority to create congressional districts comes from the federal constitution, it is vested in state agencies, to-wit, the legislatures. It is for the courts of each state to say what constitutes the legislature of that state, and whether or not the acts of such legislature are valid under the constitution of that state. Assuming that the federal constitution permits such legislation, it would be for congress to say whether the governor shall be a part of the federal machinery in redistricting the state. Until congress does so act, the question is left to the state legislatures, and it is for the state courts to decide the legal questions here at issue.

CONCLUSION.

To summarize:

1. The term "legislature" as used in Article I, section 4, of the federal constitution does not signify the entire law-making power of the state.

2. As to the State of Minnesota, the term "legislature" as used in the federal constitution means the bi-cameral body described in article 4, section 1, of the state constitution.

3. The reapportionment act of August 8, 1911, is no longer in force.

4. The reapportionment act of 1929 does not require that states be redistricted for congressional purposes in accordance with the laws thereof, or that congressmen be elected by districts of any particular description.

5. House File 1456 is not violative of the 1911 act, even if the same is still in force.

6. House File 1456 does not violate the fourteenth amendment to the federal constitution.

The respondent urges that either the petition should be dismissed or the judgment of the lower court affirmed.

All of which is respectfully submitted.

HENRY N. BENSON,
Attorney General of Minnesota,

WILLIAM H. GURNEE,
Asst. Attorney General of Minnesota,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 617.—October Term, 1931.

W. Yale Smiley, Petitioner, *vs.* Mike Holm, as Secretary of State of the State of Minnesota, St. Paul, Minnesota.	On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[April 11, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Under the re-apportionment following the fifteenth decennial census, as provided by the Act of Congress of June 18, 1929 (c. 28, 46 Stat. 21, 26), Minnesota is entitled to nine representatives in Congress, being one less than the number previously allotted. In April, 1931, the bill known as House File No. 1456, dividing the State into nine congressional districts and specifying the counties of which they should be composed, was passed by the House of Representatives and the Senate of the State and was transmitted to the Governor, who returned it without his approval. Thereupon, without further action upon the measure by the House of Representatives and the Senate, and in compliance with a resolution of the House of Representatives, House File No. 1456 was deposited with the Secretary of State of Minnesota. This suit was brought by the petitioner as a 'citizen, elector and taxpayer' of the State to obtain a judgment declaring invalid all filings for nomination for the office of representative in Congress, which should designate a subdivision of the State as a congressional district, and to enjoin the Secretary of State from giving notice of the holding of elections for that office in such subdivisions. The petition alleged that House File No. 1456 was a nullity in that, after the Governor's veto, it was not repassed by the legislature as required by law, and also in that the proposed congressional districts were not 'compact' and did not 'contain an equal number

of inhabitants as nearly as practicable' in accordance with the Act of Congress of August 8, 1911.[1]

The respondent, Secretary of State, demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action. He maintained the validity of House File No. 1456 by virtue of the authority conferred upon the legislature by Article I, section 4, of the Federal Constitution, and he insisted that the Act of Congress of August 8, 1911, was no longer in force and that the asserted inequalities in redistricting presented a political and not a judicial question. The trial court sustained the demurrer and its order was affirmed by the Supreme Court of the State. 238 N. W. 494. The action was then dismissed upon the merits and the Supreme Court affirmed the judgment upon its previous opinion. This Court granted a writ of certiorari.

Article I, section 4, of the Constitution of the United States provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by

[1]The Act of August 8, 1911, c. 5, 37 Stat. 13, provided for the apportionment of representatives in Congress among the several States under the thirteenth census. After fixing the total number of representatives and their apportionment, in sections 1 and 2, the Act provided as follows:

"Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

"Sec. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

"Sec. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State."

Law make or alter such Regulations, except as to the Places of chusing Senators."

Under the constitution of Minnesota, the 'legislature' consists 'of the Senate and House of Representatives'. Const. Minn., Art. 4, sec. 1. Before any bill passed by the Senate and House of Representatives "becomes a law", it must "be presented to the Governor of the state", and if he returns it, within the time stated, without his approval, the bill may become a law provided it is reconsidered and thereupon passed by each house by a two-thirds vote. *Id.*, Art. 4, sec. 11. The state constitution also provides that after each Federal census "the legislature shall have the power to prescribe the bounds of congressional . . . districts". *Id.*, Art. 4, sec. 23. We do not understand that the Supreme Court of the State has held that, under these provisions, a measure redistricting the State for congressional elections could be put in force by the legislature without participation by the Governor, as required in the case of legislative bills, if such action were regarded as a performance of the function of the legislature as a lawmaking body. No decision to that effect has been cited. It appears that 'on seven occasions' prior to the measure now under consideration, the legislature of Minnesota had 'made state and federal reapportionments in the form of a bill for an act which was approved by the Governor'.[2] While, in the instant case, the Supreme Court regarded that procedure as insufficient to support the petitioner's contention as to practical construction, that question was dismissed from consideration because of the controlling effect which the court ascribed to the Federal provision. 238 N. W., p. 500. The court expressed the opinion that "the various provisions of our state constitution cited in the briefs are of little importance in relation to the matter now in controversy"; that "the power of the state Legislature to prescribe congressional districts rests exclusively and solely in the language of article I, section 4, of the United States Constitution". *Id.*, p. 497. Construing that provision, the court reached the conclusion that the legislature in redistricting the State was not acting strictly in the exercise of the lawmaking power but merely as an agency, discharging a par-

[2]See Laws of Minnesota, 1858, Chap. 83; 1872, Chap. 21; 1881, Chap. 128; 1891, Chap. 3; 1901, Chap. 92; 1913, Chap. 513; 1929, Chap. 64.

ticular duty in the manner which the Federal Constitution required. Upon this point the court said (*Id.*, p. 499):

"The Legislature in districting the state is not strictly in the discharge of legislative duties as a law-making body, acting in its sovereign capacity, but is acting as representative of the people of the state under the power granted by said Article I, section 4. It merely gives expression as to district lines in aid of the election of certain federal officials; prescribing one of the essential details serving primarily the federal government and secondly the people of the state. The Legislature is designated as a mere agency to discharge the particular duty. The Governor's veto has no relation to such matters; that power pertains under the state Constitution exclusively to state affairs.—The word 'legislature' has reference to the well-recognized branch of the state government—created by the state as one of its three branches for a specific purpose—and when the framers of the Federal Constitution employed this term, we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof. We would not be justified in construing the term as being used in its enlarged sense as meaning the state or as meaning the law-making power of the state."

The question then is whether the provision of the Federal Constitution, thus regarded as determinative, invests the legislature with a particular authority and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver and thus renders inapplicable the conditions which attach to the making of state laws. Much that is urged in argument with regard to the meaning of the term 'Legislature' is beside the point. As this Court said in *Hawke* v. *Smith*, No. 1, 253 U. S. 221, 227, the term was not one "of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people". The question here is not with respect to the 'body' as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption

of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V. *Hawke* v. *Smith*, No. 1, *supra; Id.*, No. 2, 253 U. S. 231; *Leser* v. *Garnett*, 258 U. S. 130, 137. It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by Article I, section 4, is that of making laws.

Consideration of the subject matter and of the terms of the provision requires affirmative answer. The subject matter is the "times, places and manner of holding elections for Senators and Representatives". It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are neeessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections" and involves lawmaking in its essential features and most important aspect.

This view is confirmed by the second clause of Article I, section 4, which provides that "the Congress may at any time by law make or alter such regulations", with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It 'has a general supervisory power over the whole subject'. *Ex parte Siebold*, 100 U. S. 371, 387; *Ex parte Yarbrough*, 110 U. S. 651, 661; *Ex parte Clarke*, 100 U. S. 399;

United States v. *Mosley*, 238 U. S. 383, 386; *Newberry* v. *United States*, 256 U. S. 232, 255. But this broad authority is conferred by the constitutional provision now under consideration and is exercised by the Congress in making "such regulations", that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the legislature of the State upon the same subject.

The term defining the method of action, equally with the nature of the subject matter, aptly points to the making of laws. The state legislature is authorized to "*prescribe*" the times, places and manner of holding elections. Respondent urges that the fact that the words "*by law*" are found in the clause relating to the action of the Congress, and not in the clause giving authority to the state legislature, supports the contention that the latter was not to act in the exercise of the lawmaking power. We think that the inference is strongly to the contrary. It is the nature of the function that makes the phrase "by law" apposite. That is the same whether it is performed by state or national legislature, and the use of the phrase places the intent of the whole provision in a strong light. Prescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character.

As the authority is conferred for the purpose of making laws for the State, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments. We find no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted. Whether the Governor of the State, through the veto power, shall have a part in the making of state laws is a matter of state polity. Article I, section 4, of the Federal Constitution, neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority. At the time of the adoption of the Federal Constitution it appears that only two States had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through

a Council of Revision.[3] But the restriction which existed in the case of these States was well known. That the state legislature might be subject to such a limitation, either then or thereafter imposed as the several States might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President as provided in Article I, section 7. The latter consequence was not expressed but there is no question that it was necessarily implied, as the Congress was to act by law; and there is no intimation, either in the debates in the Federal Convention or in contemporaneous exposition, of a purpose to exclude a similar restriction imposed by state constitutions upon state legislatures when exercising the lawmaking power.

The practical construction of Article I, section 4, is impressive. General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the States. *McPherson* v. *Blacker*, 146 U. S. 1, 36; *Missouri Pacific Railway Co.* v. *Kansas*, 248 U. S. 276, 284; *Myers* v. *United States*, 272 U. S. 52, 119, 136; *The Pocket Veto Case*, 279 U. S. 655, 688-690. That practice is eloquent of the conviction of the people of the States, and of their representatives in state legislatures and executive office, that in providing for congressional elections, and for the districts in which they were to be held, these

[3]The constitution of Massachusetts of 1780 provided for the Governor's veto of 'bills' or 'resolves'. Part Second, Chap. I, sec. I, Art. II; 3 Thorpe, American Charters, Constitutions and Organic Laws, 1893, 1894. The Council of Revision in New York, which had the veto power under the first constitution of 1777 (Art. III), was composed of the Governor, the Chancellor, and the Judges of the Supreme Court, 'or any two of them, together with the Governor'. The veto power was given to the Governor alone by the constitution of 1821. Art. I, sec. 12, 3 Thorpe, *op. cit.*, 2628, 2641, 2642. In South Carolina, the veto power had been given by the constitution of 1776 to the 'president' (Art. VII), but under the constitution of 1778 the Governor had no veto power; see Art. XVI, 6 Thorpe, *op. cit.*, 3244, 3252.

legislatures were exercising the lawmaking power and thus were subject, where the state constitution so provided, to the veto of the Governor as a part of the legislative process. The early action in Massachusetts under this authority was by 'resolves' and these, under the constitution of 1780, were required to be submitted to the Governor and it appears that they were so submitted and approved by him.[4] In New York, from the outset, provision for congressional districts was made by statute[5] and this method was followed until 1931. The argument based on the disposition, during the early period, to curtail executive authority in the States, and on the long time which elapsed in a number of States before the veto power was granted to the Governor, is of slight weight in the light of the fact that this power was given in four States shortly after the adoption of the Federal Constitution[6], that the use of this check has gradually been extended, and that the uniform practice (prior to the questions raised in relation to the present reapportionment) has been to provide for congressional districts by the enactment of statutes with the participation of the Governor wherever the state constitution provided for such participation as part of the process of making laws. See *Moran* v. *Bowley* (Ill.) 179 N. E. 526, 527; *Koenig* v. *Flynn*, 258 N. Y. 292, 300; *Carroll* v. *Becker* (Mo.), 45 S. W. (2d) 533; *State ex hel. Schrader* v. *Polley*, 26 S. D. 5, 7. The Attorney General of Minnesota, in his argument in the instant case, states: "It is conceded that until 1931 whenever the State of Minnesota was divided into districts for the purpose of congressional elections such action was taken by the legislature in the form of a bill and presented to and approved by the governor."

---

[4]Const. Mass. 1780; 3 Thorpe, *op. cit.*, 1893, 1894; Mass. Resolves, Oct.-Nov., 1788, c. XLIX, p. 52; May-June, 1792, c. LXIX, p. 23.

[5]New York, Laws of 1789, Chap. 11; 1797, Chap. 62; 1802, Chap. 72. See Koenig *v.* Flynn, 258 N. Y. 292.

[6]Georgia, Const. 1789, Art. II, sec. 10, 2 Thorpe, *op. cit.*, 788; Pennsylvania, Const. 1790, Art. I, sec. 22, 5 Thorpe, *op. cit.*, 3094; New Hampshire, Const. 1792, Part Second, sec. XLIV, 4 Thorpe, *op. cit.*, 2482; Kentucky, Const. 1792, Art. I, sec. 28, 3 Thorpe, *op. cit.*, 1267. In Vermont, the constitution of 1793 (Chap. II, sec. 16) gave the Governor and Council a power of suspension similar to that for which provision had been made in the constitution of 1786 (Chap. II, sec. XVI) before the admission of Vermont to the Union. See, also, constitution of 1777, (Chap. II, sec. XIV), 6 Thorpe, *op. cit.*, 3744, 3757, 3767.

That the constitutional provision contemplates the exercise of the lawmaking power was definitely recognized by the Congress in the Act of August 8, 1911,[7] which expressly provided in section 4 for the election of representatives in Congress, as stated, "by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act." The significance of the clause "in the manner provided by the laws thereof" is manifest from its occasion and purpose. It was to recognize the propriety of the referendum in establishing congressional districts where the State had made it a part of the legislative process. "It is clear", said this Court in *Davis* v. *Hildebrant*, 241 U. S. 565, 568, "that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law."

The case of *Davis* v. *Hildebrant, supra*, arose under the amendment of 1912 to the constitution of Ohio reserving the right "by way of referendum to approve or disapprove by popular vote any law enacted by the General Assembly". *Id.*, p. 566. The act passed by the General Assembly of Ohio in 1915, redistricting the State for the purpose of congressional elections, was disapproved under the referendum provision and the validity of that action was challenged under Article I, section 4, of the Federal Constitution. The Supreme Court of the State, denying a mandamus to enforce the disapproved act, "held that the provision as to referendum was a part of the legislative power of the State, made so by the Constitution, and that nothing in the Act of Congress of 1911 or in the constitutional provision operated to the contrary and that therefore the disapproved law had no existence." *Id.*, p. 567. This Court affirmed the judgment of the state court. It is manifest that the Congress had no power to alter Article I, section 4, and that the Act of 1911, in its reference to state laws, could but operate

[7] See Note 1.

as a legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision. And it was because of the authority of the State to determine what should constitute its legislative process that the validity of the requirement of the state constitution of Ohio, in its application to congressional elections, was sustained. This was explicitly stated by this Court as the ground of the distinction which was made in *Hawke* v. *Smith No. 1, supra*, where, referring to the *Davis* case, the Court said: "As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the State for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state constitution when applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article I, section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required."

It clearly follows that there is nothing in Article I, section 4, which precludes a State from providing that legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power. Accordingly, in this instance, the validity of House File No. 1456 cannot be sustained by virtue of any authority conferred by the Federal Constitution upon the legislature of Minnesota to create congressional districts independently of the participation of the Governor as required by the state constitution with respect to the enactment of laws.

The further question has been presented whether the Act of Congress of August 8, 1911, is still in force. The state court held that it was not, that it had been wholly replaced by the Act of June 18, 1929. Sections 1 and 2 of the former Act, making specific provision for the apportionment under the thirteenth census, are of course superseded; the present question relates to the other sections. These have not been expressly repealed. The Act of 1929 repeals "all other laws and parts of laws" that are inconsistent with its provisions (sec. 21). The petitioner urges that

this Act contains nothing inconsistent with sections 3, 4 and 5[8] of the Act of 1911, and the only question is whether these sections by their very terms have ceased to be effective. It is pointed out that the provisions of the Act of 1911 were carried into the United States Code. U. S. C., Tit. 2, secs. 2-5. Inclusion in the Code does not operate as a reenactment; it establishes "*prima facie* the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925." Act of June 30, 1926, c. 712, 44 Stat. 1. While sections 3 and 4 of the Act of 1911 expressly referred to 'this apportionment' (the one made by that Act), the argument is pressed that they contain provisions setting forth a general policy which was intended to apply to the future creation of congressional districts, and the election of representatives, until Congress should provide otherwise.

There are three classes of States with respect to the number of representatives under the present apportionment pursuant to the Act of 1929, (1) where the number remains the same, (2) where it is increased, and (3) where it is decreased. In States where the number of representatives remains the same, and the districts are unchanged, no question is presented; there is nothing inconsistent with any of the requirements of the Congress in proceeding with the election of representatives in such States in the same manner as heretofore. Section 4 of the Act of 1911 provided that in case of an increase in the number of representatives in any State, "such additional representative or representatives shall be elected by the State at large and the other representatives by the districts now prescribed by law" until such State shall be redistricted. The Constitution itself provides in Article I, section 2, that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States", and we are of the opinion that under this provision, in the absence of the creation of new districts, additional representatives allotted to a State under the present reapportionment would appropriately be elected by the State at large. Such a course, with the election of the other representatives in the existing districts until a redistricting act was passed, would present no inconsistency with any policy declared in the Act of 1911.

Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing

[8]See Note 1.

districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all representatives allotted to the State must be elected by the State at large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import.

This conclusion disposes of all the questions properly before the Court. Questions in relation to the application of the standards defined in section 3 of the Act of 1911 to a redistricting statute, if such a statute should hereafter be enacted, are wholly abstract. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.